Supreme Court, U.S.
FILED
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NOTICE OF THE CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1995

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DAVID MORAN HARNEY,
*Petitioner,*

*vs.*

THE STATE BAR OF CALIFORNIA,
*Respondent.*

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PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT
OF THE STATE OF CALIFORNIA

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## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether the State Bar of California has violated Mr. Harney's constitutional rights to due process in finding him guilty of an offense which was never charged?

2. Whether the State Bar of California has violated Mr. Harney's constitutional rights to due process by disciplining him for maintaining a tenable position?

3. Whether the California State Bar's discipline of Mr. Harney constitutes an illegal taking in violation of the Fifth Amendment to the United States Constitution?

4. Whether Mr. Harney's constitutional right to equal protection under the laws has been violated by punishing him for allegedly collecting an excessive fee in a medical malpractice action when there would never have been any disciplinary proceedings in the first instance had the underlying action involved anything but medical malpractice?

## PARTIES TO THE PROCEEDING

Petitioner herein is: David Moran Harney, a member of the State Bar of California.

Respondent herein is: The State Bar of California.

## TABLE OF CONTENTS

Page

QUESTIONS PRESENTED . . . . . i

PARTIES TO THE PROCEEDING . . . . . ii

TABLE OF AUTHORITIES . . . . . v

OPINIONS BELOW . . . . . 1

JURISDICTION . . . . . 2

CONSTITUTIONAL AND STATUTORY PROVISIONS . . . . . 2

STATEMENT OF THE CASE . . . . . 2

REASONS FOR GRANTING THE WRIT . . . . . 4

I. IT IS A DENIAL OF DUE PROCESS TO FIND MR. HARNEY GUILTY OF AN OFFENSE WHICH WAS NEVER CHARGED . . . . . 4

II. THE RECOMMENDED DISCIPLINE, IF IMPOSED, IS AN UNCONSTITUTIONAL ABRIDGEMENT OF AN ATTORNEY'S RIGHT AND DUTY TO ADVOCATE A TENABLE POSITION . . . . 6

III. THE DISCIPLINE CONSTITUTES AN ILLEGAL TAKING WHICH VIOLATES MR. HARNEY'S RIGHT TO DUE PROCESS . . . . . 11

IV. MR. HARNEY HAS BEEN DENIED EQUAL PROTECTION UNDER THE LAW . . . . . .11

CONCLUSION . . . . . .12

APPENDIX A
Decision, The State Bar Court of the State Bar of California, Filed July 31, 1993 . . . . . A

APPENDIX B
Opinion on Review, The State Bar Court, Filed April 4, 1995 . . . . . B

APPENDIX C
Order Denying Reconsideration, The State Bar Court, Filed May 30, 1995 . . . . . C

APPENDIX D
Petition for writ of review denied, California Supreme Court, Filed April 25, 1996, and Amended May 7, 1996 . . . . . D

APPENDIX E
Two letters denying petition for reconsideration, California Supreme Court, Dated May 10, 1996 . . . . . E

APPENDIX F
United States Constitution, Amendment V and XIV . . . . . F

APPENDIX G
California Business and Professions Code § 6146 . . . . . G

## TABLE OF AUTHORITIES

Page

### Cases

BMW v. Gore,
94-896, __ U.S. __ (May 20, 1996) . . . . . .10

Cannon v. Commission on Judicial
Qualifications (1975) 14 Cal.3d 678 . . . . . 5

Chicago Burlington & Quincy Railroad v.
Chicago (1897) 166 U.S. 266 . . . . . .11

Hidalgo v. Superior Court,
Court of Appeal No. B018081,
decided January 8, 1986 . . . . . 7

In re Marriage of Flaherty (1982)
31 Cal.3d 637 . . . . . .10

In the Matter of Boyne (Rev. Dept. 1993)
2 Cal. State Bar Ct. Rptr. 389 . . . . . 5

In the Matter of Glasser (Rev. Dept. 1990)
1 Cal. State Bar Ct. Rptr. 163 . . . . . 5

In the Matter of Howard (Rev. Dept. 1993)
2 Cal. State Bar Ct. Rptr. 445 . . . . . 5

In the Matter of Respondent H (Rev. Dept. 1992)
2 Cal. State Bar Ct. Rptr. 234 . . . . . 6

In the Matter of John Ruffalo (1968)
390 U.S. 544, 88 S.Ct. 1222 . . . . . 5

Romer v. Evans,
94-1039, __ U.S. __ (May 20, 1996) . . . . . .12

**Page**

Sheldon Appel Co. v. Albert & Oliker (1989)
47 Cal.3d 863 . . . . . 9

United States v. Mallas (1985)
762 F.2d 361. . . . . 9

Van Sloten v. State Bar (1989)
48 Cal.3d 921 . . . . . 5

**Constitution**

United States Constitution
Amendment 5 . . . . . 2, 11
Amendment 14, sec. 1 . . . . . 2, 9, 11

**State Statutes**

California Business & Professions Code
§ 6146 . . . . . 2, 6-8, 11, 12

California Civil Code § 3510 . . . . . .12

California Probate Code § 3302. . . . . 7
repealed and codified under
California Family Code § 6602

**Federal Statutes**

28 U.S.C. § 1297 . . . . . 2

**Texts**

7 Witkin, *Constitutional Law*, 9th ed., § 500 . . . . . 9

No. _____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1995

DAVID MORAN HARNEY,
*Petitioner,*
*vs.*
THE STATE BAR OF CALIFORNIA,
*Respondent.*

---

## PETITION FOR WRIT OF CERTIORARI

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## OPINIONS BELOW

The order of the California Supreme Court, denying review, entered on April 25, 1996 and modified on May 7, 1996; letters from the Clerks of the California Supreme Court refusing to accept for filing petitioner's petition for reconsideration; the opinion of the Review Department, filed April 4, 1995; the order of the Review Department of the California State Bar denying the petition for reconsideration, filed May 30, 1995; and the opinion of the Hearing Department of the California State Bar Court, filed July 31, 1993, appear in the appendix hereto.

## JURISDICTION

The order of the California Supreme Court, denying review, was entered on April 25, 1996 and modified on May 7, 1996. This petition for certiorari is being filed within 90 days of both of these dates. This Court's jurisdiction is invoked under 28 U.S.C. § 1257.

## CONSTITUTIONAL AND STATUTORY PROVISIONS

The following constitutional and statutory provisions appear in the appendix hereto:

United States Constitution, Amendment 5

United States Constitution, Amendment 14, sec. 1

California Business & Professions Code § 6146

## STATEMENT OF THE CASE

The instant disciplinary action against Mr. Harney was officially commenced on October 12, 1990 when the State Bar filed its formal notice to show cause. In the Notice to Show Cause, the State Bar charged Mr. Harney with collecting an excessive fee in a medical malpractice action in violation of California Business & Professions Code § 6146[1] (*Paulis v. St. Bernardine Medical Center, et al.*) although the fee had been awarded by the trial court. Mr. Harney responded to the notice, denying the charges against him. The matter proceeded to trial

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[1] This statute imposes limits on the amount an attorney may collect in medical malpractices cases when representing a client on a contingency fee basis.

before the Hearing Department of the State Bar Court. The Hearing Department issued an opinion on July 31, 1993 recommending that Mr. Harney receive an actual suspension of 30 days and pay restitution.

Mr. Harney sought review of the Hearing Department's decision in the Review Department of the State Bar Court. On April 4, 1995, the Review Department issued its opinion in which it recommended that Mr. Harney receive an actual suspension of six (6) months and pay restitution. Shortly thereafter, the Review Department denied Mr. Harney's petition for reconsideration.

On April 25, 1996, the California Supreme Court denied Mr. Harney's petition for review, suspending Mr. Harney from the practice of law for six months and ordering Mr. Harney to pay restitution. The court modified its order on May 7, 1996 in order to reflect that Justice Mosk was of the opinion that review should be granted. Mr. Harney petitioned the California Supreme Court to reconsider its order denying review but the court refused to even consider Mr. Harney's petition on the basis that order denying review is final.

## REASONS FOR GRANTING THE WRIT

### I.

### IT IS A DENIAL OF DUE PROCESS TO FIND MR. HARNEY GUILTY OF AN OFFENSE WHICH WAS NEVER CHARGED.

The State Bar's recommendation of a six month actual suspension is predicated upon its finding that Mr. Harney was reckless or grossly negligent "in failing to reveal to his client's conservator and the settlement judge material information concerning the statutory limits on attorney fees in medical negligence cases." (Review Department Opinion, pps. 1-2.) In other words, the basis for the State Bar's recommended discipline is, in essence, that Mr. Harney was negligent, even grossly negligent in rendering legal services.

Such a finding, however, may not be used to impose discipline in the case at bar. The State Bar never charged Mr. Harney with failing to act competently. The State Bar never brought charges under Rule 6-101 nor did the State Bar ever seek to amend the charges against Mr. Harney with a charged violation of Rule 6-101. Yet, the State Bar's determination that Mr. Harney acted with gross negligence is pivotal to its entire opinion.

The State Bar's finding that Mr. Harney has acted with "gross neglect" is equivalent to a determination that Mr. Harney has failed to perform legal services competently. However, the State Bar failed to charge Mr. Harney with this offense. The pertinent rule of professional conduct in 1988, Rule 6-101[2] of the Rules

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[2] Rule 6-101 has since been substantially restated in Rule 3-110.

of Professional Conduct, provided, in part, that "[a] member of the State Bar shall not *wilfully or habitually . . . fail to use reasonable diligence* and his *best judgment* in the exercise of his skill and in the application of his learning in an effort to accomplish, with reasonable speed, the purpose for which he is employed." Mr. Harney was never charged with violating rule 6-101.

"Disbarment, designed to protect the public, is a punishment or penalty imposed on the lawyer. He is accordingly entitled to procedural due process, which includes fair notice of the charge." (*In the Matter of John Ruffalo* (1968) 390 U.S. 544, 550, 88 S.Ct. 1222, 1226, cited with approval in *Cannon v. Commission on Judicial Qualifications* (1975) 14 Cal.3d 678, 898 and *Van Sloten v. State Bar* (1989) 48 Cal.3d 921, 929.) (Citations omitted.)

"The charge must be known before the proceedings commence. They become a trap when, after they are underway, the charges are amended on the basis of testimony of the accused." (*Ruffalo, supra*, 390 U.S. at 551, 88 S.Ct. at 1226.)

An attorney may be disciplined only for misconduct properly charged in the notice to show cause. (*In the Matter of Howard* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 445.) Evidence of uncharged misconduct may not be used as an independent basis for discipline. (*In the Matter of Boyne* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 389.)

"Adequacy of notice is an essential element of due process. Due process of law requires that an accused be advised of the charges against him in order that he may have a reasonable opportunity to prepare and present his defense and not be taken by surprise by evidence offered at his trial." (*In the Matter of Glasser* (Rev. Dept. 1990) 1 Cal. State Bar Ct. Rptr. 163, 168.)

## II.

## THE RECOMMENDED DISCIPLINE, IF IMPOSED, IS AN UNCONSTITUTIONAL ABRIDGEMENT OF AN ATTORNEY'S RIGHT AND DUTY TO ADVOCATE A TENABLE POSITION.

The State Bar has recommended that Mr. Harney be suspended from the practice of law for six months. This recommendation of discipline is both unfounded and unprecedented as the *uncontradicted* evidence demonstrates that Mr. Harney possessed a tenable and good faith belief that Business & Professions Code § 6146 was inapplicable to the operative facts at bar.

Mr. Harney presented *uncontradicted* evidence before the Hearing Department of the California State Bar which indicated that Business & Professions Code § 6146 was inapplicable. As the hearing judge found in the proceedings below, Mr. Harney honestly and in good faith believed that Business & Professions Code § 6146 did not apply to the case at bar for the simple reason that he neither contracted for nor collected a contingency fee. There was more than ample evidence to support the hearing judge's determination on this point. In fact, the evidence was uncontradicted.[3]

Furthermore, at the time the superior court ordered the fee, there was no authority whatsoever for the proposition that Business & Professions Code § 6146 is applicable to a case such as *Paulis*. Indeed, the status of the

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[3] Disciplinary charges must be proved by the State Bar examiner by clear and convincing evidence. All reasonable doubts must be resolved in favor of the accused attorney. (*In the Matter of Respondent H* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 234.)

law at the time indicated that Business & Professions Code § 6146 was inapplicable to the *Paulis* case.

As Mr. Harney informed Loretta Paulis, the mother of his client, Wendy Paulis, the latter's incompetent status precluded him from entering into a fee agreement with either Wendy Paulis or her conservator, Loretta Paulis. Instead, Mr. Harney's fee could only be determined by the superior court pursuant to California Probate Code § 3302[4] (subsequently repealed and now codified under Section 6602 of the Family Code.)

There can be no dispute that Mr. Harney received a court-awarded fee. This fee, as the uncontradicted evidence indicates, was not a contingent fee. Rather, it was awarded by the superior court pursuant to California law.

In a case nearly identical to the instant one, the Court of Appeal in *Hidalgo v. Superior Court,* Court of Appeal No. B018081, decided January 8, 1986, refused to alter a trial court's finding that a fee award in a medical malpractice case was properly based on section 21.01-5 of the Los Angeles County Superior Court Probate Policy Memorandum, rather than section 6146. Thus, *Hidalgo* represented further support for Mr. Harney's tenable and good faith belief that Business & Professions Code § 6146 was inapplicable.

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[4] At the time, Probate Code § 3302 provided that "A contract for attorney's fees for services in litigation, made by or on behalf of a minor, is void unless the contract is approved by the court in which the litigation is pending or the court having jurisdiction of the guardianship estate of the minor, upon petition of any interested person. When no such contract is approved and a judgment is recovered by or on behalf of a minor, the attorney's fees chargeable against the minor shall be fixed by the court rendering the judgment." The local rules of the San Bernardino Superior Court incorporate Probate Code § 3302 in cases involving incompetents.

In the case at bar, there is not one iota of evidence that Mr. Harney actually held the belief that Business & Professions Code § 6146 was applicable to the underlying case. Rather, the uncontradicted evidence indicated that he believed, in good faith, that Business & Professions Code § 6146 was inapplicable. Mr. Harney should not be punished on the novel theory that an attorney is required to discuss with his or her client a point of law which the attorney reasonably and in good faith believes is inapplicable.

For the same reason, Mr. Harney should not be punished for his alleged "failure" to bring section 6146 to the trial court's attention. Judge Turner, who presided over the settlement of the underlying medical malpractice action, had many years of experience on the bench at the time in question and who formerly served as a district attorney. He knew full well that this was a medical negligence action. As Mr. Harney testified during the proceedings below, he has never met a judge who is unaware of § 6146. If Judge Turner believed § 6146 may have been applicable, then he should have ordered a hearing. However, he did not. As Mr. Harney reasonably believed that Business & Professions Code § 6146 was inapplicable (and not "possibly" inapplicable), he had no obligation whatsoever to discuss the matter with Judge Turner, unless Judge Turner sought a discussion on this point. As we now show, the imposition of discipline in the case at bar amounts to an unconstitutional abridgement of a lawyer's right and duty to advocate a tenable position, especially where, as here, the lawyer maintains a good faith belief in the validity of that position.

Given these facts, it is clear that the State Bar's recommendation that Mr. Harney be suspended from the practice of law for six months for his pursuit of a tenable

legal position violates Mr. Harney's constitutional rights.

The Fourteenth Amendment to the federal Constitution provides that no state shall "deprive any person of life, liberty, or property, without due process of law."

"Notice is fundamental to due process. 'Engrained in our concept of Due Process is the requirement of notice. Notice is [] essential so that the citizen has the chance to defend charges. Notice is required before property interests are disturbed, before assessments are made, and before penalties are assessed. Notice is required in a myriad of situations where a penalty or forfeiture might be suffered for mere failure to act.' " (7 Witkin, *Constitutional Law*, 9th ed., § 500, pps. 692-693.) (Citations omitted.)

"Criminal prosecution for the violation of an unclear duty itself violates the clear constitutional duty of the government to warn citizens whether particular conduct is legal or illegal." (*United States v. Mallas* (1985) 762 F.2d 361, 363.)

In *Mallas, supra*, the defendants were convicted of federal income tax evasion. On appeal, the court held that the convictions, which were based on defendants' design of a tax shelter program, could not stand as they were based on a point of law which was vague and open to debate.

The principle set forth in *Mallas, supra*, has been applied to a wide spectrum of cases other than those involving tax evasion. For example, it has long been recognized that in the context of an action alleging malicious prosecution of a prior civil suit, "it is not 'true charges' but rather legally tenable claims for relief that the law seeks to protect." (*Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 885.)

In addressing the related question as to the appropriate standard for determining the frivolousness of an appeal, the California Supreme Court in *In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 650 held that an appeal could only be found frivolous if "any reasonable attorney would agree that the appeal is totally and completely without merit." In reaching its holding, the court reasoned that "any definition must be read so as to avoid a serious chilling effect on the assertion of litigants' rights . . . Counsel and their clients have a right to present issues that are arguably correct, even if it is extremely unlikely that they will win." (*Id.*)

Here, there was no warning that Mr. Harney could be punished for asserting a tenable position. Rather, the practice of law, by its very nature, requires an attorney to assert positions which are tenable when at all possible.[5] To impose discipline in such a setting will have grave implications for both the legal profession and our system of jurisprudence. And, "It violates 'elementary notions of fairness' to punish" Mr. Harney with such a severe penalty when he has done nothing wrong. (*BMW v. Gore*, 94-896, __ U.S. __ (May 20, 1996).)

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[5] The imposition of an actual six month suspension also violates Mr. Harney's due process rights as Mr. Harney was never given *notice* of the contemplated discipline prior to its recommendation.

## III.

## THE DISCIPLINE CONSTITUTES AN ILLEGAL TAKING WHICH VIOLATES MR. HARNEY'S RIGHT TO DUE PROCESS.

The Fifth Amendment to the United States Constitution prohibits governmental takings of private property "for public use without just compensation." The prohibition is applicable to the states through the Fourteenth Amendment. (*Chicago Burlington & Quincy Railroad v. Chicago* (1897) 166 U.S. 266.)

The State Bar's suspension of Mr. Harney and order of restitution amounts to a taking of Mr. Harney's property rights without due process of law.[6]

Moreover, the California Supreme Court has refused to review the matter, and only five of the seven justices on the Court participated in the order denying review, one justice being of the opinion that review should be granted.

## IV.

## MR. HARNEY HAS BEEN DENIED EQUAL PROTECTION UNDER THE LAW.

Mr. Harney was charged with violating California Business & Professions Code § 6146 which is part of the Medical Insurance Compensation Reform Act

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[6] That Mr. Harney was not afforded due process has been set forth in sections I & II above.

("MICRA") 1975,[7] which was purportedly enacted to remedy a "crisis" that existed concerning medical malpractice insurance.

However, there is no evidence that this alleged "crisis" exists today or that it even existed at the time Mr. Harney is alleged to have collected a fee in excess of the limits set forth in Business & Professions Code § 6146. (California Civil Code § 3510 ["When the reason for a rule ceases, so should the rule itself"].)

Accordingly, Mr. Harney is being discriminated against in the absence of a legitimate "state interest" to support the discrimination. As such, § 6146 is unconstitutional. (*See Romer v. Evans*, 94-1039, __ U.S. __ (May 20, 1996) ["It is not within our constitutional tradition to enact laws of this sort . . . [that] single out a certain class of citizens for disfavored treatment"].)

## CONCLUSION

For these reasons, a writ of certiorari should issue to review the order of the California Supreme Court.

DATED: May 29, 1996.

Respectfully submitted,

VINCENT McGOWAN
*Counsel of Record*

THE HARNEY LAW OFFICES

*Counsel for Petitioner*

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[7] This legislation was also known as the "Anti-Harney Bill."

# APPENDIX A

THE STATE BAR COURT
OF THE STATE BAR OF CALIFORNIA
HEARING DEPARTMENT - LOS ANGELES

**FILED**
JUL 31 1993
State Bar Court
Clerk's Office
Los Angeles

In the Matter of
DAVID MORAN HARNEY,
No. 20281,

A Member of the State Bar.

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Case No.: 90-0-14277-CWS

## DECISION

## I. INTRODUCTION

This matter came before the Court for hearing on the issue of culpability on November 2, 4, 5, 6, 10, 12, 13, 16, and 19, 1992; and December 2, 1992. Participating in the culpability hearing were Respondent David Moran Harney[1] ("respondent"); Gert Hirschberg and Michael Friedman, Counsel for respondent; and Ronald E. Magnuson, Examiner for the Office of Trials of the State Bar. Respondent participated throughout these proceedings as co-counsel with attorneys Hirschberg and Friedman.

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[1] Respondent was admitted to the practice of law in the State of California on January 1, 1949, and has been a member of the State Bar since that time.

The Court made its tentative rulings of culpability in its Notice of Facts Judicially Noticed & Tentative Rulings on Culpability filed May 6, 1993. Thereafter, the matter came before the Court for a hearing on the degree of discipline on June 16, 1993. Participating in the discipline hearing were attorneys Hirschberg and Friedman and examiner Magnuson; respondent was not present. All hearings were audio recorded. The matter was submitted for decision at the end of the discipline hearing on June 16, 1993.

In light of the culpability for professional misconduct found against respondent in these proceedings, the Court recommends that respondent be suspended from the practice of law for two years, that said suspension be stayed, and that respondent be placed on probation for two years upon conditions including actual suspension for 30 days and restitution.

## II. PROCEDURAL HISTORY

The Notice to Show Cause ("NTSC") in these proceedings was filed on October 12, 1990. A copy of the NTSC was properly served upon respondent on October 17, 1990, by certified mail, return receipt requested, at his latest address shown on the official membership records of the State Bar.

Respondent filed his Answer to the NTSC on October 26, 1990. Respondent asserts five "affirmative defenses" in his answer. Respondent's first, second, and third "affirmative defenses" clearly are not affirmative defenses, but legal argument. As noted below, respondent has failed to establish his forth and fifth affirmative defenses of res judicata and selective prosecution, respectively.

## III. PRELIMINARY MATTERS

### A. Sections 6068(a) & 6103

In each of the three counts in the NTSC, the Office of Trials alleges that respondent violated sections 6068(a) and 6103 of the California Business and Professions Code.[2]

Section 6068(a) provides that it is the duty of an attorney to "support the Constitution and the laws of the United States, and of this state." It is well established that a violation of section 6068(a) may not be based upon an attorney's violation of a professional duty set forth in the California Business and Professions Code or the Rules of Professional Conduct of the State Bar of California ("Rules of Professional Conduct"). (*Bates v. State Bar* (1990) 51 Cal.3d 1056, 1060.)

The Office of Trials does not allege in the NTSC that respondent violated any specific law other than various sections of the California Business and Professions Code regulating attorney conduct and various rules of the Rules of Professional Conduct. Accordingly, the Court holds that each of the Office of Trials' alleged section 6068(a) violations is fatally defective and, therefore, dismisses them all.

Section 6103 sets forth an attorney's duty to comply with court orders and prescribes discipline for an attorney's violation of his oath or duties as an attorney. It is well established that an attorney cannot violate section 6103 unless he violates a court order. (*Read v. State Bar* (1991) 53 Cal.3d 394, 406.) The Office of Trials does not allege in the NTSC that respondent violated a court

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[2] All section references herein are to the California Business and Professions Code unless otherwise indicated.

order. Accordingly, the Court holds that each of the Office of Trials' alleged section 6103 violations is fatally defective and, therefore, dismisses them all.

In the Court' view, fatally defective allegations, such as these, are unfair to respondents and a waste of limited judicial resources.

**B. Count 1**

The pleadings upon which a matter goes to trial should only contain those issues to be tried. Therefore, even though the Court granted the Office of Trials' oral motion at the hearing and dismissed the alleged violations of rule 3-300 of the former Rules of Professional Conduct (1989 version) and rule 5-101 of the former Rules of Professional Conduct (1975 version) in count 1 of the NTSC, in the future, the Office of Trials is to request the dismissal of specific allegations by seeking leave to file an amended NTSC that omits the unwanted allegations. All of the charges asserted against a respondent (and only those charges) should be pleaded in a single NTSC, and every defense asserted by a respondent (and only those defenses) should be pleaded in a single answer.

Furthermore, the Court dismisses the alleged violations of rules 4-200(A) and 5-200(A) of the former Rules of Professional Conduct (1989 version) contained in count 1 of the NTSC on the basis that the alleged misconduct is pleaded as having occurred before the May 27, 1989, effective date of these rules.

**C. Count 3**

The Court dismisses the alleged violation of rule 8-101(B)(4) of the former Rules of Professional Conduct

of the State Bar of California (1975 version) contained in count 3 of the NTSC on the basis that the alleged misconduct is pleaded as having occurred after former rule 8-101(B)(4) was repealed effective May 27, 1989.

## IV. FINDINGS OF FACT & CONCLUSIONS OF LAW

### A Background Facts

In November 1986, Wendy Paulis entered St. Bernadine's Medical Center ("St. Bernadine") for an elective anterior cervical fusion. Wendy Paulis never fully "awoke" from the anesthesia and remains in a permanent semi-comatose state.

In December 1986, Wendy Paulis's mother, Loretta Paulis ("Mrs. Paulis"), met with respondent in his office to discuss suing St. Bernadine and Wendy's attending physicians for professional negligence, etc. Respondent testified that he told Mrs. Paulis that he would have to review Wendy Paulis's medical records and look into the matter further before he could determine whether he would be willing to accept the case.

Respondent also testified that, after this initial meeting, he did not hear from Mrs. Pualis until February 1987 when he allegedly received a note from her authorizing him to proceed. Respondent asserts that, via this note, Mrs. Pualis retained him to pursue Wendy Paulis's claims against St. Bernadine and the attending physicians.

On March 11, 1987, at respondent's direction, a Complaint for Personal Injuries Due to Medical and Hospital Negligence was filed against St. Bernadine and Wendy Paulis's attending physicians for negligence and malpractice in *Wendy Paulis, by and through her*

*guardian ad litem, Loretta Paulis v. Stanley Alan Rouhe, M.D.; Hans Johann Gritsch, M.D.; St. Bernadine's Medical Center; and Does 1-100*; Case Number 236-758 in the Superior Court of the State of California for the County of San Bernardino ("medical malpractice suit"). [State Bar Ex. 6.][3]

Thereafter, at respondent's direction, a petition to appoint Mrs. Paulis guardian ad litem for Wendy Paulis was filed in the medical malpractice suit on March 16, 1987. On March 16, 1987, the Superior Court granted the petition and signed an order appointing Mrs. Paulis guardian ad litem for Wendy Paulis in the medical malpractice suit. [State Bar Ex. 7.]

In accordance with respondent's instructions, Mrs. Paulis retained another attorney to file a petition to appoint her the conservator of the person and estate of Wendy Paulis. Shortly thereafter, such a petition was filed by another attorney in Case Number SC 7977 in the Superior Court of the State of California for the County of San Bernardino ("conservatorship proceedings"). On April 29, 1987, the Superior Court granted Mrs. Paulis's petition and issued Letters of Conservatorship appointing Mrs. Paulis the conservator of the person and estate of Wendy Paulis, an incompetent.

Before the medical malpractice suit was called to trial, a number of settlement conferences were held

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[3] The Office of Trials failed to properly pre-mark many of its exhibits in this matter. Multiple page exhibits are not numbered consecutively. In the future, the Office of Trials is to insure that each of its exhibits is properly marked in accordance with the rules of this Court before they are included in any pre-trial statement or proffered into evidence. (State Bar Court Rules of Practice, rule 1223(c).) In addition, the Clerk of the State Bar Court is not to accept or mark any exhibit proffered at trial unless it has been so pre-marked.

before Superior Court Judge Don A. Turner; however, the case did not settle.

Eventually, in the Summer of 1988, the medical malpractice suit went to trial before Superior Court Judge Bob N. Krug. After a couple of days of testimony, the case was going in favor of the plaintiff. Accordingly, Judge Krug suggested to the defendants that they really ought to settle with the plaintiff and sent the parties to another settlement conference before Judge Turner. The parties soon reached a settlement.

On July 19, 1988, Mrs. Paulis executed and filed a Petition of Guardian Ad Litem & Conservator for Compromise of Disputed Claim of Incompetent ("petition for compromise"). [State Bar Ex. 3.] The petition for compromise contains a notarized verification by Mrs. Paulis. Contrary to respondent's testimony, the petition for compromise was not filed in the conservatorship proceedings; it was filed in the medical malpractice suit. In fact, pursuant to section 2505 of the California Probate Code, the only Court with proper jurisdiction to rule on the petition for compromise was the Court in which the medical malpractice suit was pending.

Respondent testified that the petition for compromise was jointly prepared by him and the attorney for Mrs. Paulis in the conservatorship proceedings. However, respondent's testimony on this issue was equivocal. While respondent testified that he does not remember whether the petition for compromise was prepared and/or typed in his or the office of Mrs. Paulis's attorney in the conservatorship proceedings, he also testified that Carole Klove, an attorney who works for respondent's firm, may have prepared the petition for compromise.

Furthermore, the only counsel listed as counsel for Mrs. Paulis on the petition for compromise was respondent's law firm. Respondent does not even remember who Mrs. Paulis's other attorney was.

On July 19, 1988, a hearing was held on the petition for compromise before Judge Turner. Contrary to respondent's testimony, the attorney who represented Mrs. Paulis in the conservatorship proceedings was not present at the hearing. [State Bar Ex. 5, p. 6.] Nor were any of the attorneys for the defendants present as respondent testified they were. [State Bar Ex. 5, pp. 1 & 2.]

The Court finds that the petition for compromise was prepared solely by respondent (or at his sole direction) and that Mrs. Paulis was represented only by respondent at the July 19, 1988, hearing on the petition for compromise.

In the petition for compromise, Mrs. Paulis sought court approval to settle the medical malpractice suit against all the named defendants for $3,450,000. According to the petition for compromise, $1,348,233 of the $3,450,000 would be paid to Wendy Paulis's conservator in cash at the time of settlement and the remaining $2,101,767 ($3,450,000 less $1,348,233) would be used to buy an annuity that would provide to Wendy Paulis's conservator: (1) monthly payments of $15,000 for the life of Wendy Paulis with a 10 year minimum (these monthly payments were to increase at the rate of 3% per annum, compounded annually); (2) one guaranteed lump sum payment of $100,000 in 1993; and (3) one lump sum payment of $250,000 in 1998.

In the petition for compromise, Mrs. Paulis also sought court approval to pay, out of the $1,348,233 that was to be paid in cash at the time of settlement, respondent's law firm the sum of $846,250 in attorney's fees and $65,000 in expenses relating to the medical malpractice suit.

At the July 19, 1988, hearing, Judge Turner granted Mrs. Paulis's petition and signed an Order Approving Compromise of Incompetent Claim ("order approving compromise"), approving the $846,250 in attorney's fees

and the $65,000 in costs and expenses that Mrs. Paulis sought in the petition for compromise. Respondent admits that his firm received the $846,250 in attorney's fees and $65,000 reimbursement.

Sometime in 1989, attorney C. Patrick Milligan was contacted by Curt Jure ("Jure"), who was formerly employed by respondent's law firm as a paralegal. Jure told attorney Milligan that he thought respondent had charged and collected a fee in the Paulis medical malpractice case that exceeded the legal limits under section 6146 by at least $250,000 and asked attorney Milligan if he would be interested in representing Mrs. Paulis in her attempt to recover the alleged excess fees from respondent and respondent's law firm. Attorney Milligan agreed to speak with Mrs. Paulis. Thereafter, Mrs. Paulis spoke with attorney Milligan and retained him to recover the excess fees from respondent and his law firm.

On June 6, 1989, attorney Milligan sent respondent a letter in which he stated that the maximum lawful fee respondent was entitled to recover in the medical malpractice suit under section 6146, which limits the amount of contingency fees and attorney may recover in medical malpractice actions, was $595,416[4] and demanded that respondent return the $250,834 he collected in excess of that legal limit ($846,250 less $595,416 = $250,834) to Mrs Paulis. [State Bar Ex. 1.] Respondent received attorney Milligan's letter on June 8, 1989.

Respondent sent attorney Milligan a reply letter on June 12, 1989, rejecting Mrs. Paulis's claim to a refund and contending that the fee his law firm collected in the medical malpractice suit was not based upon a

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[4] Attorney Milligan miscalculated the maximum lawful fee under section 6146 and the amount of excess fees that should be refunded.

contingent fee agreement, but "upon the reasonable value of our services." [State Bar Ex. 2.]

After attorney Milligan received respondent's June 12, 1989, reply letter, he asked Judge Kramer in the San Bernardino County Courthouse whether the Judge thought it would be proper if he (attorney Milligan) spoke to Judge Turner about the $846,250 in attorney's fees respondent collected in the medical malpractice case. Judge Kramer replied in the affirmative. Judge Kramer also told attorney Milligan to forward copies of all of the documents he had to the San Bernardino Police Department and District Attorney. Attorney Milligan promptly did so.

Approximately one week later, attorney Milligan received a telephone call from Detective Gary Salazar of the San Bernardino Police Department. Detective Salazar instructed him to telephone and send copies of all the documents to the State Bar.

Attorney Milligan telephoned and sent copies of all the documents to the State Bar and lodged a complaint against respondent for collecting a fee in excess of the section 6146 limits. Attorney Milligan testified, and the Court so finds, that no one with the State Bar has ever solicited him to file a complaint against respondent.

Attorney Milligan also filed a complaint seeking to recover the overcharged amount from respondent and respondent's law firm in *Loretta Paulis, as Conservator of the Person and Estate of Wendy L. Paulis, an incompetent, v. David M. Harney; Harney, Wolfe, Pagliuso, Shaller & Carr; et al.*; Case Number 250,683 in the Superior Court of the State of California for the County of San Bernardino ("excessive fee suit"). [Testimony of Attorney Milligan; *see also* State Bar Ex. 9.]

Mrs. Paulis is now deceased. According to Joy Mahaffey, Mrs. Paulis's other daughter, Mrs. Paulis died in either April of 1989 or April of 1990.

After Mrs. Paulis's death, the Superior Court in the conservatorship proceedings appointed Joy Mahaffey the successor Conservator of the Person and Estate of Wendy Paulis. Eventually, a dispute arose among Wendy Paulis's siblings over the handling of Wendy's estate. The Superior Court in the conservatorship proceedings, therefore, appointed San Bernardino County Public Guardian Melody Scott the Conservator of the Estate of Wendy Paulis in place of Joy Mahaffey. Joy Mahaffey remains the Conservator of the Person of Wendy Paulis.

Public Guardian Scott instructed attorney Milligan to continue to vigorously pursue the excessive fee suit against respondent and respondent's law firm. Respondent indicated to the Court that the excessive fee suit is still pending and currently set for trial on August 23, 1993. [*See* Respondent's Brief Re Discipline, p. 7.]

## B. Count 1

### 1. Section 6146 & Former Rule 2-107(A) (1975 version)

In February 1987 when respondent undertook to represent Mr. Paulis in the medical malpractice suit, section 6146(a) provided that:

> [a]n attorney shall not contract for or *collect* a contingency fee for representing any person seeking damages in connection with an action for injury or damage against a health care provider based upon such person's alleged professional negligence in excess of the

following limits:

(1) Forty percent of the first fifty thousand dollars ($50,000) recovered.

(2) Thirty-three and one-third percent of the next fifty thousand dollars ($50,000) recovered.

(3) Twenty-five percent of the next one hundred thousand dollars ($100,000) recovered.

(4) Ten percent of any amount on which the recovery exceeds two hundred thousand dollars ($200,000).

The limitations shall apply regardless of whether the recovery is by *settlement*, arbitration, or *judgment*, or whether the person for whom the recovery is made is a responsible adult, an infant, or *a person of unsound mind.*

(former Cal. Bus. & Prof. Code, § 6146(a) [1975 version] [emphasis added].)

However, when respondent actually collected the $846,250 in attorney's fees in the medical malpractice suit, section 6146(a) provided higher limits. Effective January 1, 1988, the maximum fee schedule in section 6146(a) was modified to allow fees of 25% of any recovery between $200,000 and $600,000 and 15% of any recovery in excess of $600,000. (Cal. Bus. & Prof. Code, § 6146(a) [emphasis added].)

When an attorney contracts for a contingency fee, the maximum fee he may collect is set by the version of 6146(a) at the time the contract was entered into. (*Wienholz v. Kaiser Foundation Hospitals* (1989) 217 Cal.App.3d 1501, 11506-07.) Accordingly, if an attorney collects a contingency fee without having previously entered into a contingency fee agreement, the maximum

fee he may collect is set by the version of 6146(a) at the time he collects the fee.

Section 6146(c)(1) defines the term "recovered" as "the net sum recovered after deducting any disbursements or costs incurred" in connection with the claim. Section 6146(c)(2) defines the term "health care provider." Licensed doctors and hospitals are included in section 6146(c)(2)'s definition of "health care provider."

The Rules of Professional Conduct have long proscribed the collection of illegal fees. At the time respondent collected the $846,250 in attorney's fees, the proscribing rule was rule 2-107(A) of the former Rules of Professional Conduct (1975 version — effective January 1, 1975, to May 26, 1989) ("former rule 2-107(A)"). Former rule 2-107(A) provided that an attorney "shall not enter into an agreement for, *charge, or collect* an illegal or unconscionable fee" (Emphasis added.)

Clearly, a contingent fee in excess of the maximum limits set forth in section 6146 would be an illegal fee; the collection of which would violate the proscription of illegal fees of the Rules of Professional Conduct.

The office of Trials alleges that respondent violated section 6146 and former rule 2-107(A) when he and his firm collected the $846,250.00 in attorney's fees. The Court agrees.

Respondent offered several arguments regarding the fees. Respondent contends that section 6146 was not applicable to the medical malpractice suit because the $846,250 in attorney's fees was not collected pursuant to a contingency fee agreement, but were collected as a "reasonable fee" fixed by the Superior Court pursuant to section 3302 of the California Probate Code. Alternatively, respondent contends that the order approving

compromise is res judicata on the propriety of the $846,250 in attorney's fees. Further, respondent alternatively contends that, if section 6146 was applicable to the medical malpractice suit, the $846,250 did not exceed the maximum lawful limits under section 6146. Alternatively still, respondent contends that if the $846,250 in attorney's fees did exceed the maximum lawful limits under section 6146, he did not violate section 6146 or former rule 2-107(A) because he did not collect them, his law firm did. The Court rejects respondent's contentions.

**a. health care providers**

In its Notice of Facts Judicially Noticed & Tentative Rulings on Culpability filed May 6, 1993, the Court took judicial notice, pursuant to sections 452(c) and 452(h) of the California Evidence Code, that each of the named defendants in the medical malpractice suit were "health care providers," as that term is defined in section 6146(c)(2), at least, from the time they each treated Wendy Paulis in 1986 until the summer of 1988 when the medical malpractice suit was settled and respondent and his law firm collected the $846,250 in attorney's fees therein.

**b. contingency fee**

Respondent testified that he told Mrs. Paulis at their initial meeting that the law prohibited him from entering into a fee agreement and that the Superior Court was required to determine the fee after the trial was over or the case settled because Wendy Paulis is an incompetent. This testimony is consistent with respondent's pre-trial statement that "[t]here was no fee arrangement entered into other than a statement by respondent to members of

the Paulis family that the fees, if any, would have to be determined by the court."

In addition, respondent testified that no court would approve any type of fee agreement before trial in a case involving a minor or incompetent because it would have no way of knowing what the ultimate results would be. This is incorrect. Attorneys can enter into *contingent* fee agreements in connection with tort claim's asserted on behalf of incompetent persons, and courts do approve such fee agreements. (*See* Cal. Prob. Code, § 2644 [procedures for approving contingent fee contracts with attorneys].)

Respondent's testimony at the hearing was fairly consistent with his testimony at his July 18, 1990, deposition in the excessive fee suit. [State Bar Ex. 9.] At his deposition, on the question of whether he ever discussed his attorney's fees with or made a fee proposal to Mrs. Paulis, respondent answered that he:

> didn't really propose anything. I was asked [by Mrs. Paulis] if there would be a fee that would be needed in advance, and I said that there would be no fee agreement whatsoever. The fee, if, as and when there would be a fee, would be determined by the Superior Court in San Bernardino County. *I said that if there was no successful result, there would be no request for any fee.* If there was a successful result, then the Court would determine what the fee would be.

[State Bar Ex. 9, p. 6.]

On the question of whether he told Mrs. Paulis, before the July 19, 1988, hearing on the petition for compromise, how the $846,250 in attorney's fees requested was calculated, respondent testified:

> I advised her that the policy of San Bernardino County was 25 percent in those cases that were settled regarding a minor [or] incompetent more than two weeks before trial, and one-third in those cases where the case was settled within the two weeks or in trial. And I told her that I was not going to seek the higher fee.
>
> That's what I told her. She said fine.

[State Bar Ex. 9, pp. 18-19.]

The Court finds that Judge Turner approved the request for $846,250 in attorney's fees because it was a fee of 25% of the net amount recovered after costs and expenses ([$3,450,000 - $65,000] x .25 = $846,250), which was within the general guidelines of rules 1111, 1111.1, and 1111.2 of the Rules of the Superior Court of San Bernardino County. [Testimony of Judge Turner.] These Superior Court rules provide that, in compromised tort actions involving minors or incompetents, fees in excess of the following limits *ordinarily* are considered unreasonable. (1) in cases settled more than two weeks prior to trial — 25% of the net amount recovered; and (2) in cases settled within two weeks of or during trial — 33 1/3% of the net amount recovered.

Furthermore, the Court finds that the $846,250 in attorney's fees was not a fee based on or equal to the reasonable value of respondent's services (*i.e.*, a "reasonable fee"). [Testimony of Judge Turner.] In fact, the $846,250 in attorney's fees could not have been a "reasonable fee" because Judge Turner never heard any evidence on the numerous factors that are considered when setting or determining a "reasonable fee" for legal services rendered in a legal proceedings. [Testimony of Judge Turner.] These factors include:

> the nature of the litigation; its difficulty and the amount involved; the skill required and the

> skill employed in handling the litigation; the attention given; the success of the attorney's efforts; his learning, his age, and his experience in the particular type of work demanded; the intricacies and importance of the litigation; the labor and necessity for skilled legal training and ability in trying the cause; and the time consumed. [Citation.]

(*Nevin v. Salk* (1975) 45 Cal.App.3d 331, 343; *see also* Rules Prof. Conduct of State Bar, rule 4-200(B) [which sets forth virtually the identical factors to consider in determining whether a fee is unconscionable].)

Section 6146 is one of the provisions of the Medical Injury Compensation Reform Act of 1975 ("MICRA"), which the legislature of this state enacted, pursuant to its police powers, to reduce and control the escalating cost of medical malpractice insurance.[5] In *Roa v. Lodi Medical Group, Inc.* (1985) 37 Cal.3d 920, the Supreme Court upheld the constitutionality of the limits section 6146 places on the amount of contingency fees attorneys may charge or collect in medical malpractice cases. In doing so, the Supreme Court expressly held, *inter alia*, that section 6146's limits on contingency fees were rationally related to MICRA's objective to reduce and control medical malpractice insurance cost. (*Roa*, 37 Cal.3d at 930-33.) Respondent admits that he is very knowledgeable of the Supreme Court's Opinion in Roa (he filed an amici curiae brief in it with the Supreme Court).

Even though this Court does not express a view as to the wisdom of section 6146, it construes it by reading the statutory language in context, keeping in mind the

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[5] For a discussion of the background against which MICRA was enacted in some detail, see *American Bank & Trust Co. v. Community Hospital* (1984) 36 Cal.3d 359.

nature and purpose of its enactment, and by giving it a reasonable interpretation that will promote rather than defeat the intent of the law. (*Poppers v. Tamalpais Union High School District* (1986) 184 Cal.App.3d 399, 404.)

In the Court's view, the Supreme Court's opinion in *Roa* highlights that the section 6146 limits on contingency fees in medical malpractice cases are, to large extent, for the benefit of the injured plaintiffs. For example, the Supreme Court noted:

> In order to reduce malpractice insurance costs, MICRA incorporated a number of provisions that place special limits on, or that at least may tend to reduce, a malpractice plaintiff's recovery, provisions that are not applicable to other personal injury plaintiffs. (*See, e.g.*, Civ. Code §§ 3333.2, subd. (b) [limiting recovery for noneconomic losses to $250,000]; 3333.1 subd. (a) [authorizing admission of evidence of "collateral source benefits"].) *The Legislature may reasonably have concluded that a limitation on contingency fees in this field was an "appropriate means of protecting the already diminished compensation" of such plaintiffs from further reduction by high contingency fees.* [Citation.]

(*Roa*, 37 Cal.3d at 932 [emphasis added].)

In addition, the Supreme Court noted:

> The Legislature could reasonably have concluded that the sliding-scale approach in fact produces more equitable fees than the traditional flat contingency fee, *helping to ensure that an attorney does not obtain a "windfall" simply because his client is very seriously injured and guaranteeing that the most*

> *seriously injured plaintiffs will retain the lion's share of any recovery secured on their behalf.* [Footnote.]

(*Roa*, 37 Cal.3d at 933 [emphasis added]; *see also Roa*, 37 Cal.3d at 931 ["[S]ection 6146 permits an attorney to take only a smaller bite of a settlement."].)

In addition, one Court has reviewed the legislative history of section 6146 and concluded that "[i]t is abundantly clear . . . that the Legislature considered vesting the trial court with the authority to set reasonable attorney's fees [in medical malpractice cases] and specifically rejected this proposal." (*Hathaway v. Baldwin Park Community Hospital* (1986) 186 Cal.App.3d 1247, 1253.) Accordingly, the court in *Hathaway* held that courts do not have the power to award attorney's fees in excess of the section 6146 limits. (*Id.*)

Further, the parties may not waive the section 6146 limits on attorney's fees because to do so would contravene the public purpose of MICRA. (*Fineberg v. Harney & Moore* (1989) 207 Cal.App.3d 1049, 1055-56; Cal. Civ. Code, § 3513 ["[A] law established for a public reason cannot be contravened by a private agreement."].)

In *Quanstsrom v. Standard Guaranty Insurance Co.* (1988, Fla. App. [5th Dist.]) 519 So.2d 1135, 1136, the court held that an agreement "to the effect that if the attorney ultimately prevailed . . ., the attorney would be entitled to a fee which would be in the amount the court allowed as an attorney's fee under section 627.428, Florida Statutes, *rather than a percentage of the recovery*" was a contingency fee agreement. The court in *Quanstsrom* further held that "[i]f the agreement between a client and an attorney is that the attorney gets paid in the event of a result favorable to the client but

does not receive a fee in the other event, the arrangement is a contingency fee agreement." (*Id.*)

Moreover, the court in *Quanstsrom* concluded that:

> [t]he controlling substantive character of a contingency fee agreement is the feature that the attorney gets paid in one event and not in another. It is only an incidental aspect of this feature that, in practice, contingency fee agreements are most commonly used by counsel seeking to recover money for plaintiffs and that the fee to be paid is calculated in terms of a percentage of any recovery. *That the compensation is calculated by reference to a percentage of a recovery is not an essential aspects of a lawyer's contingency fee.*

(*Id.* at 1136, fn. 1)

In fact, it is only because of this "gamble" that a contingency fee agreement may, if the parties agree, properly provide an attorney with greater compensation than would otherwise be reasonable. (*See Rader v. Thrasher* (1962) 57 Cal.2d 244, 253; *see also Estate of Raphael* (1951) 103 Cal.App.2d 792, 796 ["A contingent fee contract since it involves a gamble on the result, *may* properly provide for a larger compensation that would otherwise be reasonable" but there is no requirement that it do so.] [emphasis added].)

The Court concludes that, in the context of section 6146, a contingent fee agreement is any fee agreement in which the payment of attorney's fees is conditioned upon a recovery by the plaintiff client from a defendant regardless of whether the compensation is calculated by reference to a percentage of the recovery or a formula (*e.g.*, a "reasonable fee" determined by a court pursuant to an application of the factors set forth in *Nevin*, 45

Cal.App.3d at 343). (*Accord Quanstsrom*, 519 So.2d at 1136.)

Despite respondent's contention that he had no fee agreement with Mrs. Paulis, the record establishes, and the Court holds, that respondent entered into a contingency fee agreement with Mrs. Paulis when he undertook to represent her in February 1987. He agreed to represent her and pay all costs and expenses and agreed not to get paid unless he was successful on the claim against St. Bernadine and the physicians. Accordingly, it is clear that the $846,250 in attorney's fees he and his law firm collected in the medical malpractice suit was a contingency fee collected pursuant to the agreement.

Furthermore, regardless of whether respondent ever entered into a contingency fee agreement with Mrs. Paulis, it is clear that the $846,250 in attorney's fees he and his law firm collected in the medical malpractice suit was a contingency fee of 25% of the net amount recovered after costs and expenses.

**c. excessive & illegal fee**

Under section 6146, the maximum lawful contingency fee respondent was entitled to collect in the medical malpractice suit was $380,150. This maximum fee is calculated, based upon the net sum recovered after costs and expenses of $3,385,000 ($3,450,000 - $65,000), Cal. Bus. & Prof. Code, § 6146(c)(1), as follows:

(1) 40% of the first $50,000 = $20,000;
(2) 33 1/3 of the second $50,000 = $16,650;
(3) 25% of the next $100,000 = $25,000;
(4) 10% of the remaining net sum recovered over $200,000; or 10% of ($3,385,00 - $200,000) = $318,500;

for a total maximum lawful fee of $380,150 ($20,000 + $16,650 + $25,000 + $318,500).

Respondent collected a contingency fee of $846,250 which was $466,100 ($846,250 - 380,150) more than the maximum lawful amount. Accordingly, the Court holds that respondent willfully violated section 6146 and collected an illegal fee of $466,100 in willful violation of former rule 2-107(A).

"Wilful violation of the Rules of Professional Conduct is established by a demonstration that the attorney ' "acted or omitted to act purposely that is, that he knew what he was doing or not doing and that he intended either to commit the act or abstain from committing it. [Citations.]' " (*Phillips v. State Bar* (1989) 49 Cal.3d 944, 952.)

**d. respondent's defenses/contentions**

1. res judicata

First, respondent contends that he may not be disciplined for collecting the $846,250 in attorney's fees because the order approving compromise is res judicata on the propriety of the $846,250 in attorney's fees. Respondent's contention is meritless. The order approving compromise is not res judicata on the propriety of the $846,250 in attorney's fees because the Superior Court did not have the power to award fees in excess of the MICRA limits. (*Hathaway v. Baldwin Park Community Hospital* (1986) 186 Cal.App.3d 1247, 1253.) However, even if the order approving compromise is res judicata on the propriety of the $846,250 in attorney's fees, it is res judicata only as to respondent and his client, not as to the State Bar. (*But see In the Matter of Trousil* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 229, 238 ["[A] client who has consented to retention of

illegal fees may properly demand to receive back such illegal fees.].)

Clearly, respondent's culpability on the charges of professional misconduct are not determined upon principles of res judicata.

2. no excessive fee collected

Second, respondent contends that, even if section 6146 was applicable to the medical malpractice suit, he did not collect a fee in excess of the section 6146 limits because the recovery was not merely $3,450,000, but was $21,700,000 as testified to by respondent's economic expert.

Respondent's economic expert testified that $3,450,000 was not the "true" recovery because it was based upon the purchase price of the annuity; that the recovery should have been determined based upon the arithmetic sum of all the monthly payments to be received; and that, using a 50 year life expectancy for Wendy Paulis, the total recover based upon the arithmetic sum of all the monthly payments to be received would be $21,700,000. Respondent argues that, if one use this $21,700,000 figure as the recovery, the maximum lawful contingency fee under section 6146 would be $3,326,667.

Respondent's contention that the true recovery is $21,700,000 is frivolous and calls into question his professed good faith. The "issue" of whether attorney's fees are calculated on the purchase price of an annuity (or the present value of the steam of payments) or the arithmetic sum of all the payments to be received was resolved in 1989 in *Schneider v. Kaiser Foundation Hospitals* (1989) 215 Cal.App.3d 1311, 1317-20.

In *Schneider* the Court noted that it was the first California Court to address this "issue." (*Schneider*, 215 Cal.App.3d at 1318.) The Court then speculated that the absence of any appellate authority on the "issue" was probably due to the fact that "the answer is well known to experienced practitioners and courts, with virtual unanimity among them that the manner of calculating attorneys fees . . . is to determine the *present value* of the stream of future payments." (*Id.* [emphasis added].) The Court went on to note that the present value of the stream of future payments "is normally best represented by the cost of the annuity purchased to fund the payments. [Citations.]." (*Schneider*, 215 Cal.App.3d at 1319.)

3. respondent did not receive the fee

Again, respondent contends that, even if the $846,250 in attorney's fees did exceed the maximum lawful limits under section 6146, he did not violate section 6146 or former rule 2-107(A) because he did not collect the $846,250. This contention is meritless.

The record establishes that Mrs. Paulis had an attorney-client relationship with respondent. Respondent my [*sic*] not hide behind his law firm "to cloak his own professional lapses" or to shift part of his responsibility and liability for it to his partners. (*Bernstein v. State Bar* (1990) 50 Cal.3d 221, 231.)

Law firms operate through their partners. Respondent was the partner acting on behalf of his firm in the Paulis medical malpractice suit.

**2. Section 6147 & Section 6148**

The Office of Trials alleges that respondent violated sections 6147 and 6148. Section 6147 requires that all contingent fee agreements with plaintiff clients be in writing. Section 6148 requires that when it reasonably appears that the attorney's fees will exceed $1,000, the fee agreement be in writing.

An attorney's failure to comply with either section 6147 or 6148 is not a disciplinable offense per se. Section 6147(b) expressly provides that an attorney's failure to comply with *any provision* of section 6147 renders the fee agreement voidable at the client's option and that upon a fee agreement being voided, the attorney shall be entitled to collect a reasonable fee. A virtually identical provision is found in section 6148(c).

Accordingly the Court holds sections 6147 and 6148 are relevant to attorney discipline only to the extent that an attorney collects an unreasonable fee from a client after the client has elected to void the fee agreement under section 6147(b) or 6148(c). This is because the Rules of Professional Conduct proscribe, *inter alia*, unconscionable fees.

There is no evidence that the Conservator of the Estate of Wendy Paulis ever elected to void the fee agreement with respondent pursuant to either section 6147(b) or 6148(c) and that respondent thereafter collected an unconscionable fee. The record establishes that the conservator has elected to affirmed the fee agreement and demand a refund of only that portion of the $846,250 that exceeded the maximum lawful limits under section 6146. (*See Trousil*, 1 Cal. State Bar Ct. Rptr. at 238 [A client may properly demand to receive back illegal fees.].)

Accordingly, the Court declines to apply sections 6147 and 6148 in these proceedings.

### 3. Sections 6068(b), 6068(d) & 6106 & Former Rule 7-105(1) (1975 version)

Section 6068(b) provides that attorneys have a duty to maintain the respect of the courts and judicial officers. Both section 6068(d) and rule 7-105(1) of the former Rules of Professional Conduct (1975 version) ("former rule 7-105(1)") provide that attorneys have a duty to use only such means that are consistent with truth and never seek to mislead a judge or judicial officer. Section 6106 provides that the commission of any act involving moral turpitude, dishonesty, or corruption shall result in severe discipline.

The gravamen of Office of Trials' allegations that respondent violated these three sections and former rule 7-105(1) is respondent's failure to disclose the applicability of section 6146 to the medical malpractice suit to Mrs. Paulis and to Judge Turner.

Respondent admits that he never disclosed the applicability of section 6146 to either Judge Turner or Mrs. Paulis. In addition, there were never any discussions before Judge Turner regarding whether the recoverable attorney's fees were limited under section 6146. Judge Turner did not think of MICRA when he signed the order approving compromise; he simply assumed the request for $846,250 in attorney's fees in the petition for compromise was legal.

As Judge Turner testified, that the reason it did not occur to him to determine whether the 25% fee in the medical malpractice suit exceeded the maximum lawful limits under section 6146 was because San Bernardino County limits were almost always below the MICRA

limits and because the 25% fee was within the San Bernardino County's general limits on attorney's fees for minors and incompetents. Judge Turner also testified that the Paulis medical malpractice suit was the first case he ever handled in which San Bernardino County's general limits were not below the MICRA limits.

At least one court has pointed out that, after MICRA, the widespread practice of approving contingency fees for legal services on behalf of minors and incompetents on the basis of 25% of the recovery is no longer appropriate. (*See Schneider v. Kaiser Foundation Hospitals* (1989) 215 Cal.App.3d 1311, 1320-21 fn. 8.)

After considering respondent's demeanor while testifying; the manner in which he testified; the character of his testimony; and the extent of his capacity to perceive, recollect, and communicate the matters on which he testified, the Court finds that respondent honestly, albeit erroneously, believed that section 6146 was not applicable to the attorney's fees in the medical malpractice suit. (*See In the Matter of Wright* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 219, 227 [The Court should declare how it weighed the evidence and determined the credibility of the parties and witnesses.]; *see also* Cal. Evid. Code § 780 [listing the various factors that should be considered in making credibility determinations].)

The Court finds that respondent did not disclose the applicability of section 6146 to Judge Turner and Mrs. Paulis because of this erroneous belief. Accordingly, the Court holds that the Office of Trials has not established these alleged violations of sections 6068(b), 6068(d), and 6106 and former rule 7-105(1) by clear and convincing evidence.

Of course, respondent's erroneous belief that section 6146 did not apply to the medical malpractice suit is not a defense to his willful violations of section 6146 and

former rule 2-107(A). (*See Read*, 53 Cal.3d at 411 [Lack of bad faith goes to the seriousness of the violation, not its existence.].) Nor does his erroneous belief entitle him to a finding of good faith mitigation because he has failed to establish that his mistaken belief was reasonable. (*See Powers v. State Bar* (1988) 44 Cal.3d 437, 341 [An unreasonable mistaken belief, even if honestly held, will not support a finding of good faith mitigation.].)

**C. Count 2**

The Office of Trials alleges in count two that respondent engaged in a deceitful scheme to avoid the application of sections 6146 and 6147 in the medical malpractice suit. As noted above in count one, the Court declines to apply section 6147 in the present proceedings. Furthermore, the Court holds that the Office of Trials failed to prove any deceitful scheme in light of the Court's finding that respondent erroneously believe that section 6146 was not applicable to the medical malpractice suit. In summary, no ethic violations are found under count two.

**D. Count 3**

The Office of Trials alleges in count three that respondent failure to return the illegal portion of the $846,250 in attorney's fees in response to attorney Milligan's June 8, 1989, demand therefor was a willful violation of rule 4-100(B)(4) of the former Rules of Professional Conduct (1989 version) ("former rule 4-100(B)(4)"). In addition, the Office of Trials alleges that this failure involves moral turpitude, dishonesty, or corruption in violation of 6106. The Court agrees that respondent's failure is a willful violation of former rule

4-100(B)(4), but disagrees that it involves moral turpitude, dishonesty or corruption. (*See, e.g., In the Matter of Hagen* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 153, 167-68 [Not all willful misappropriations involve moral turpitude, dishonesty, or corruption.].)

Furthermore, the Court declines to consider respondent's willful violation of former rule 4-100(B)(4) in making its recommendation on discipline. The gravamen of respondent's misconduct was the collection of an illegal fee. The Court concludes that his refusal to return the illegal fee is not overtly reprehensible in light of respondent's erroneous belief that section 6146 was not applicable to the medical malpractice suit. (*See, e.g., Read*, 53 Cal.3d at 411 [Lack of bad faith may reduce the gravity or seriousness of a violation.].)

**E. Selective Prosecution**

Respondent argues that these proceedings should be dismissed because he is being selectively prosecuted. Respondent alleges that the State Bar is prosecuting him solely because he is a top plaintiffs' lawyer. The Court rejects respondent's claims.

As the Review Department noted in *In the Matter of Bach* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 631, 645, it is not at all clear that the claim of selective prosecution (which is in the nature of an affirmative defense) applies in State Bar Court proceedings. This is particularly true in the present proceedings where respondent has been accused of collecting an illegal fee from a client.

It is axiomatic that the attorney-client relationship is a fiduciary relationship and that the attorney owes his client all the duties of a fiduciary. It is also axiomatic that, in the area of fees, attorneys have a fiduciary duty

to insure that their fee agreements are "fair, reasonable and fully explained to the client." (*Alderman v. Hamilton* (1988) 205 Cal.App.3d 1033, 1037.) In fact, it is well established that fee agreements that are in violation of an attorney's duties are unenforceable. *Kallen v. Delug* (1984) 157 Cal.App.3d 940, 951.)

In light of these basic principles and the fact that the subject matter of these proceedings involved respondent's fee arrangements with Mrs. Paulis, the Court does not find respondent's selective prosecution claim persuasive. The Court simply does not find a claim of selective prosecution applicable in cases involving attorney fee agreements. In the Court's view, it is a method by which an attorney could be absolved of responsibility for his misconduct involving one to which he owes specific fiduciary duties.

Let it be clear, the Court's analysis of respondent's selective prosecution defense is not directed at respondent's conduct; no allegations of breach of fiduciary duty have been asserted against respondent.

Even assuming, *arguendo*, that the defense of selective prosecution is applicable to State Bar Court proceedings, it is clear that it "must be based upon specific allegations of constitutionally impermissible discrimination and must be presented by pretrial motion." (*Bach*, 1 Cal. State Bar Ct. Rptr. at 645-46,, *citing Murgia v. Municipal Court* (1975) 15 Cal.3d 286, 293-94, fn.4, 297, 299-300.) Respondent did not assert his claim in a pre-trial motion; nor has he established that he has been impermissibly discriminated against.

In any event, the Court notes that the record establishes that the Office of Trials filed the NTSC herein only after it was determined that reasonable cause existed to charge that respondent violated various regulatory provisions. (*See, generally, In the Matter of*

*Glasser* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 163, 172.)

## V. AGGRAVATING CIRCUMSTANCES

Respondent's misconduct harm significantly his client, the Conservator of the Estate of Wendy Paulis. (Rules Proc. of State Bar, div. V, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(b) (iv) ["Standards"].) Of course, the extent of significant harm he caused his client by collecting $466,100 in excess fees is reduced in light of the $3,450,000 recovery respondent obtained for his client.

Respondent's misconduct harmed and contravened the public purpose of MICRA.

On January 18, 1990, respondent was publicly reproved for contracting and collecting a fee in 1982 in excess of the limits set forth in section 6146. However, respondent contracted for an collected the $846,250 in attorney's fees in the medical malpractice suit before this January 18, 1990, reproval. Therefore, at the time he contracted for and collected the $846,250, he was not on "notice" that he was engaging in unethical conduct. Accordingly, the Court declines to find that his January 18, 1990, reproval amounts to an aggravating circumstance under standard 1.2(b) (i).

## VI. MITIGATING CIRCUMSTANCES

Respondent's numerous years of dedicated practice without any prior record of discipline is a *very* strong mitigating circumstance. (Standard 1.2(e) (i).)

Respondent has been candid and cooperative with the State Bar during the underlying disciplinary investiga-

tion and during these Court proceedings. These are *very* strong mitigating circumstances. (Standard 1.2(e) (v).)

In addition, a number of witnesses testified as to the extraordinary good character of respondent. Accordingly, this is also a *very* strong mitigating circumstance. (Standard 1.2(e) (vi).)

## VII. APPROPRIATE LEVEL OF DISCIPLINE

The purpose of State Bar disciplinary proceedings is not to punish, but to protect the public, preserve public confidence in the legal profession, and maintain the highest possible professional standards for attorneys. (*Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111; *Cooper v. State Bar* (1987) 43 Cal.3d 1016, 1025; Standard 1.3.)

The Supreme Court has repeatedly held that "[r]estitution is *fundamental* to the goal of rehabilitation." (*Hippard v. State Bar* (1989) 49 Cal.3d 1084, 1094 [emphasis added].) In fact, because an attorney's responsibilities differ for those of a layman, an attorney may "be required to make restitution as a moral obligation even when there is no legal obligation to do so." (*Distefano*, 1 Cal. State Bar Ct. Rptr. at 674, *citing Brookman v. State Bar* (1988) 46 Cal.3d 1004, 1008.)

Furthermore, the Supreme Court has repeatedly held that restitution is an extremely effective method of protecting the public and rehabilitating errant attorneys because it forces an attorney to confront the harm caused by his misconduct in real, concrete terms. (*Hippard*, 49 Cal.3d at 1093; *Brookman*, 46 Cal.3d 1004, 1009; *see also Kelly v. Robinson* (1986) 479 U.S. 36, 49 fn. 10.)

Of course, in the absence of compelling circumstances, restitution should be made in an amount consistent with the loss attributable to one's professional

or other misconduct. Accordingly, one's restitution for theft, misappropriation, embezzlement, etc. should include interest to compensate the victim for the lost use of his property or money. (*See Martin v. State Bar* (1991) 52 Cal.3d 1055, 1064 [The general rule is to order the payment of interest.].)

In addition, one's restitution should normally include any reasonable attorney's fees the victim incurred in trying to recover his property or money. However, the Office of Trials has not requested that respondent be required to reimburse the Conservator of the Estate of Wendy Paulis for the legal fees she has incurred in the excessive fee suit, and the Court does not view it necessary to consider them in its discipline recommendation.

The Office of Trials argues in that standard 2.7 applies to respondent's violation of former rule 2-107(A). However, standard 2.7 states in plain language that it applies only to "violations of that portion of rule 2-107 . . . re entering into an agreement for, charging or collecting an unconscionable fee." The Office of Trials has never alleged that any portion of the $846,250 in attorney's fees respondent collected in the medical malpractice suit was unconscionable. Accordingly, it's assertion that the Court should apply standard 2.7 is frivolous.

The only applicable standard is standard 2.10, which provides that the discipline to be imposed shall be "reproval or suspension according to the gravity of the offense or the harm, if any, to the victim." The gravity of the offense is serious. The harm caused is the wrongful collection of $446,2100 in illegal fees from a client. While respondent's wrongful collection of $466,100 is not found to be a misappropriation, its harm caused is similar to that of a misappropriation.

The Office of Trials recommends that respondent be suspended from the practice of law for one year, that

said one-year suspension be stayed, and that respondent be placed on probation for two years subject to conditions including restitution of $266,832.66[6] plus interest thereon. In its Brief on Discipline, the Office of Trials states that the applicable law indicates that a period of actual suspension should be imposed upon respondent, but that it declines to recommend any period of actual suspension because it "believes itself obliged to basically follow the recommendation made in its pre-trial statement, inasmuch as it did not seek to amend that recommendation prior to trial."

The Office of Trials is clearly mistaken; the parties are *not* bound by the discipline recommendation contained in their respective pre-trial statements. In fact, even uncharged misconduct that is established at trial may be found to be an aggravating circumstance. (*See In the Matter of Hertz* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 456, 465.)

Respondent recommends that an admonition or, at most, a private reproval be ordered.

The Court, however, after weighing the nature and scope of respondent's misconduct, the aggravating circumstances, the strong mitigating circumstances, and standard 2.10 in light of the underlying purpose of State Bar disciplinary proceedings, concludes that a moderate stayed suspension and a moderate term of probation with conditions including a period of 30 days of actual suspension and restitution are appropriate.

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[6] The Office of Trials does not indicate how it calculated this amount. It appears to be incorrect regardless of which version of section 6146 one applies.

## VIII. RECOMMENDED DISCIPLINE

IT IS HEREBY RECOMMENDED that Respondent DAVID MORAN HARNEY be suspended from the practice of law in the State of California for a period of two years, that said two-year suspension be stayed, and he be placed on probation for a period of two years subject to the following conditions:

1. That respondent shall be suspended from the practice of law in California during the first 30 days of said period of probation;

2. That, with in one year of the effective date of the Supreme Court's disciplinary order in this matter, respondent make restitution to the Conservator of the Estate of Wendy Paulis, an Incompetent (or the Client Security Fund if it has paid the Conservator of the Estate of Wendy Paulis) in the sum of $466,100 plus interest thereon at the rate of 10% per annum from July 8, 1989, until paid;

3. That during the period of probation, respondent shall comply with the provisions of the State Bar Act and Rules of Professional Conduct of the State Bar of California;

4. That during the period of probation, respondent shall report not later than January 10, April 10, July 10 and October 10 of each year or part thereof during which the probation is in effect, in writing, to the Probation Unit, Office of Trials, Los Angeles, which report shall state that it covers the preceding calendar quarter or applicable portion thereof, certifying by affidavit or under penalty of perjury (provided, however, that if the effective date of probation is less than 30 days preceding any of said dates, respondent shall file said report on the due date next following the due date after said effective date):

(a) in his first report, whether he has complied with all provisions of the State Bar Act, and Rules of Professional Conduct since the effective date of said probation;

(b) in each subsequent report, whether he has complied with all provision of the State Bar Act and Rules of Professional Conduct during said period;

(c) provided, however, that a final report shall be filed covering the remaining portion of the period of probation following the last report required by the foregoing provisions of this paragraph certifying to the matters set forth in subparagraph (b) thereof;

5. That subject to assertion of applicable privileges, respondent shall answer fully, promptly and truthfully any inquiries of the Probation Unit of the Office of Trials and any probation monitor assigned under these conditions of probation which are directed to respondent personally or in writing relating to whether respondent is complying or has complied with these terms of probation;

6. That respondent shall promptly report, and in no event in more than 10 days, to the membership records office of the State Bar and to the Probation Unit all changes of information including current office or other address for State Bar purposes as prescribed by section 6002.1 of the Business and Professions Code;

7. That respondent shall attend and satisfactorily complete the State Bar's Ethics School within one year of the date on which the order of the Supreme Court in this matter becomes effective and furnish satisfactory proof of such to the Probation Unit of the Office of Trials within said year. This condition of probation is separate and apart from respondent's Mandatory Continuing Legal Education ("MCLE") requirements;

accordingly, respondent is ORDERED not to claim any MCLE credit for attending and completing the State Bar's Ethics School.

8. That the period of probation shall commence as of the date on which the order of the Supreme Court in this matter becomes effective;

9. That, at the expiration of the period of this probation, if respondent has complied with the terms of his probation, the order of the Supreme Court suspending respondent from the practice of law for a period of two years shall be satisfied and the suspension shall be terminated.

It is not recommended that respondent be ordered to take and pass the California Professional Responsibility Examination because he was recently ordered to take and pass the Professional Responsibility Examination administered by the National Conference of Bar Examiners in his January 18, 1990, public reproval.

## IX. AWARD OF COSTS

It is recommended that costs incurred by the State Bar in this matter be awarded to the State Bar pursuant to section 6086.10 of the California Business and Professions Code and that such costs be added to and become part of the membership fee of respondent for the calendar year next following the effective date of the Supreme Court's order in this matter.

Dated: July 31, 1993.

Christopher W. Smith
CHRISTOPHER W. SMITH
Judge of the State Bar Court

# APPENDIX B

**DESIGNATED FOR PUBLICATION**

**PUBLIC MATTER**

REVIEW DEPARTMENT OF THE
STATE BAR COURT

**FILED**
APR 04 1995
State Bar Court
Clerk's Office
Los Angeles

In the Matter of

DAVID M. HARNEY

A Member of the State Bar

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No. 90-0-14277

## OPINION ON REVIEW

We have been asked by both parties to review a disciplinary case in which respondent David M. Harney was found by a State Bar Court hearing judge to have, inter alia, collected an attorney fee which was $266,850 in *excess* of the statutory limits on contingent attorney fees for a medical negligence case. The heart of this case is not, as respondent would suggest, a principled disagreement over the validity or interpretation of the statutory limits. The constitutionality of the limits on attorney contingent fees in these cases was a settled issue at the time of respondent's misconduct. (*Roa v. Lodi Medical Group, Inc.* (1985) 37 Cal.3d 920.) Our concern is with respondent's ethical duties to his client

to reveal those mandatory limits in negotiating and collecting his fee. After considering the arguments of counsel and reviewing the record below, we conclude that respondent not only collected an illegal fee sizably in excess of that permitted by settled law, but obtained client and court consent thereto by recklessness or gross neglect, in failing to reveal to his client's conservator and the settlement judge material information concerning the statutory limits on attorney fees in medical negligence cases.

This case is about far more than an attorney simply collecting more fees than state law allowed. Rather, it reveals how an unsophisticated client, in this case an incompetent adult whose mother obtained respondent's services, can be taken advantage of by an attorney who fails to reveal material information in favoring his own interest over the client's interests in receiving all the recovery she is entitled by law to receive. This record and other appellate decisions arising out of respondent's conduct show that respondent has not gained any insight into his duty to protect his client's entitlement to her full share of the recovery vis-a-vis his own self-interest in maximizing his fee. Rather, because of respondent's intransigence, this client and at lease three others have been forced to sue him in separate actions to establish his duty to follow state law.

Given respondent's long distinguished career, the necessity of this proceeding is regrettable. Nonetheless, under the circumstances, which include a public reproval in 1990 for similar misconduct, we agree with the State Bar that substantially greater discipline than the 30-day actual suspension recommended by the hearing judge is warranted as well as a requirement of compliance with rule 955 of the California Rules of Court. Had the concealment been found to be intentional, disbarment would not have been inappropriate for the amount of

money his client was misled to pay as a fee. Based on our analysis of relevant caselaw and the standard for degree of discipline for unconscionable fees, we recommend a six-month suspension.

## FACTS

Respondent is self-described as the top medical malpractice attorney and one of the top 10 trial attorneys in the United States today. Admitted to practice in California 1948, he worked as a research attorney for the California Court of Appeal for 18 months, then entered private practice, representing primarily plaintiffs in product liability and medical negligence actions. He rose to prominence in the early 1960's with a series of product liability lawsuits against an automobile manufacturer. Respondent testified that he has taken over 100 medical negligence cases to verdict and 9 out of 10 of his medical negligence cases settle. He is the author of *Medical Malpractice* (2d ed. 1987), past president of the International Academy of Trial Lawyers, and a member of the Inner Circle of Advocates and the American Board of Trial Advocates.

Respondent testified before the California Legislature in 1975 during its committee hearings on the Medical Injury Compensation Reform Act ("MICRA"),[1] and has

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[1] Part of the Medical Injury Compensation Reform act (MICRA) limited attorney fees (Bus. & Prof. Code, § 6146) in medical negligence cases. The statue applicable from 1975 until January 1, 1988, provided for fee limits as follows: "(a) An attorney shall not contract for or collect a contingency fee for representing any person seeking damages in connection with an action for injury or damage against a health care provider based upon such person's alleged professional negligence in excess of the following limits: [¶] (1) Forty percent of the first fifty thousand dollars ($50,000) recovered. [¶] (2) Thirty-three and one-third percent of the next fifty thousand

(continued)

been a steadfast opponent of its provisions since its passage. Respondent and his office filed a number of amicus curiae briefs unsuccessfully challenging the constitutionality of the legislation, including in the following cases: *Waters v. Bourhis* (1985) 40 Cal.3d 424; *Fein v. Permanente Medical Group* (1985) 38 Cal.3d 137; *Roa v. Lodi Medical Group, Inc., supra*, 37 Cal.3d 920; and *American Bank & Trust Co. v. Community Hospital* (1984) 36 Cal.3d 359. Respondent has been a defendant in litigation brought by his clients contesting his fees in medical negligence actions after the passage of MICRA, resulting in two published opinions. (*Schultz v. Harney* (1994) 27 Cal.App.4th 1611, review den. Dec. 21, 1994; *Fineberg v. Harney & Moore* (1989) 207 Cal.App.3d 1049, review den. April 26, 1989.) The *Fineberg* case also held that a client could not waive the benefits of the attorney fee limits of MICRA.

One of respondent's medical negligence clients was Wendy Paulis. On November 4, 1986, at age 32, she underwent elective back surgery for an anterior cervical fusion at a hospital in San Bernardino County and never fully awoke from the operation. She remains in a semi-conscious state to date.

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(fn. continued)
dollars ($50,000) recovered. [¶] (3) Twenty-five percent of the next one hundred thousand dollars ($100,000) recovered. [¶] (4) Ten percent of any amount on which the recovery exceeds two hundred thousand dollars ($200,000). [¶] The limitations shall apply regardless of whether the recovery is by settlement, arbitration, or judgment, or whether the person for whom the recovery is made is a responsible adult, an infant or a person of unsound mind." (Former Bus. & Prof. Code, § 6146 (a) [(1975 version].) As of January 1, 1988, the limits were raised to permit fees of 25 percent of amounts recovered between $100,000 and $600,000, and 15 percent of amounts recovered in excess of $600,000.

On December 30, 1986, Loretta Paulis,[2] Wendy's mother, met with respondent in his office to discuss a possible lawsuit against the hospital and Wendy's physicians. After discussing Wendy's injuries and the conditions of his possible representation, respondent said he would investigate the case, and then decide if he would accept it.

Respondent discussed the financial arrangements for his representation with Mrs. Paulis, and recounted it in a later deposition taken in civil litigation: "I didn't really propose anything. I was asked if there would be a fee that would be needed in advance, and I said that there would be no fee agreement whatsoever. The fee, if, as and when there would be a fee, would be determined by the Superior Court in San Bernardino County. I said that if there was no successful result, there would be no request for a fee. If there was a successful result, then the Court would determine what the fee would be."

No mention was made of the possible applicability of MICRA which by its terms applies to collection of fees as well as contracts for fees. (See fn. 1 *ante*.) By the time respondent accepted the case, the constitutionality of the attorney-fee limits of MICRA had been settled for over a year as a result of a Supreme Court decision in which respondent had participated as amicus curiae. (*Roa v. Lodi Medical Group*, *supra*, 37 Cal.3d 920.)

Respondent investigated the background of the case and left a message with Mrs. Paulis in the early of 1987 that he was willing to undertake the case. Mrs. Paulis sent him a note in February 1987 with the simple instruction, "You are authorized to proceed."

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[2] Mrs. Paulis died prior to the filing of the notice to show cause. After Mrs. Paulis's death, a dispute arose among Wendy's relatives about her estate and the San Bernardino County Public Guardian, Melody Scott, was made conservator of the estate of Wendy Paulis.

Respondent and his office prepared and filed on March 11, 1987, in San Bernardino County Superior Court, a medical negligence complaint on behalf of Wendy by her guardian ad litem, Mrs. Paulis, against the hospital and two physicians. In a separate action arranged by respondent but filed by another lawyer, Mrs. Paulis was appointed conservator of the person and estate of Wendy Paulis on April 29, 1987.

After extensive pretrial activities, including a number of settlement conferences before Superior Court Judge Don A. Turner, the case went to jury trial in the summer of 1988 before another judge. After jury selection and several days of trial, the trial judge suggested to the parties that settlement might again be explored before Judge Turner. In the prior discussions of settlement, respondent explained to Mrs. Paulis the method he expected to use for determining the attorney fees he was requesting. In his deposition in a later civil case, he stated: "My recollection is that I advised her that the policy of San Bernardino County was 25 percent in those cases that were settled regarding a minor incompetent [sic] more than two weeks before trial, and one-third in those cases where the case was settled within the two weeks or in trial. And I told her that I was not going to seek the higher fee. That's what I told her. She said fine."

Again, no mention was made of *any* potential applicability of MICRA although it applied to recovery by settlements *and* judgments as well as contingent fee agreements. The settlement was reached on July 19, 1988, and on that date, the petition by the guardian ad litem to compromise the contested claim was filed and heard by Judge Turner. The petition was prepared by an associate in respondent's office and respondent was the only attorney present before Judge Turner. The settlement agreement, which was affixed to the petition, stated

the settlement value at $3, 450,000. Respondent submitted costs of $65,000, and requested $846,250 for attorneys fees, exactly 25 percent of the $3,450,000 settlement, minus costs.

After questioning Mrs. Paulis briefly concerning her understanding of the terms of the settlement, Judge Turner signed the order approving the compromise of claim. Respondent acknowledged at the discipline hearing that he at no time mentioned the possible application of the provisions of MICRA to either Mrs. Paulis or Judge Turner. According to respondent, he was not obliged to mention MICRA because he did not have a contingent fee agreement with Mrs. Paulis and these were court-ordered fees so MICRA did not apply. Notwithstanding Supreme Court precedent upholding the attorney fee provisions of MICRA, respondent also considered MICRA unconstitutional. Under the MICRA limits applicable to fees collected after January 1, 1988, respondent was entitled to a maximum fee of $579,400.

Judge Turner explained that the issue did not occur to him because ordinarily the 25 percent awarded for attorney fees under the county guidelines was lower than the maximum fees permitted under MICRA. He had never reviewed a settlement in which the mount of attorney fees awarded under the county's 25 percent policy exceeded the MICRA limits. Judge Turner testified that had he been aware of the discrepancy between the fees awarded under the policy and those permitted under MICRA, he would have set a hearing to determine if he had the jurisdiction to exceed the limits under MICRA and if so, whether there were facts in the case to justify the additional fees.

By letter dated June 6, 1989, attorney C. Patrick Mulligan advised respondent that Mrs. Paulis had retained him to represent Wendy and herself as guardian and requested that respondent refund to Wendy's estate

the excess fees. On June 12, 1989, respondent rejected Mulligan's demand. As a result of conversations with the trial and settlement judges in the Paulis litigation, Mulligan eventually filed a formal complaint against respondent with the State Bar.[3]

## PROCEDURAL MOTIONS

The State Bar represented by the Office of the Chief Trial Counsel has asked us to take judicial notice of two matters: by written motion, a stipulation in the mal-practice case against respondent (see fn. 3, *ante*), under rule 1304 of the Provisional Rules of Practice of the State Bar Court[4] ; and, by oral motion at argument on September 7, 1994, a Court of Appeal case filed on September 1, 1994, *Schultz v. Harney*, *supra*, 27 Cal.App.4th 1611. Respondent has not filed a response to the written motion. Since these documents post-date the hearing department proceedings and concern matters discussed at the hearing, we take judicial notice of them pursuant to section 452, subdivision (d) of the Evidence Code (notice of court records).

Respondent has not filed a motion for us to take judicial notice or consider additional evidence, but has

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[3] Mulligan also filed a civil suit against respondent and his law firm to recover the alleged excess fees. (*Paulis v. Harney* (Super. Ct. San Bernardino County No. 250683).) After Mrs. Paulis' death, the San Bernardino Public Guardian, Melody Scott, instructed Mulligan to continue the lawsuit, and it remains pending.

[4] This case was briefed and argued prior to the January 1, 1995, effective date of new Rules of Practice of the State Bar Court and Rules of Procedure of the State Bar. Accordingly, we apply the Provisional Rules of Practice of the State Bar Court and Transitional Rules of Procedure of the State Bar in effect prior to January 1, 1995. (See rule 1, Rules Proc. for State Bar Ct. Proceedings, eff. Jan. 1, 1995.)

sought to place documents, some of which were not before the hearing judge, in the record by including them in an appendix to his opening brief. The State Bar has filed an objection and a motion to strike the appendix. The first eight items in the appendix are documents which are already a part of the record before us and it would be unnecessary for us to take judicial notice of them. The remaining five documents relate to a hearing department case which was pending at the time of respondent's request for review and which has since been dismissed without prejudice on motion of the State Bar. Respondent has not indicated how these documents will either correct the record below or fill in an otherwise incomplete record. (See rule 1304, Provisional Rules of Practice.) In the absence of a proper motion with reasons in an accompanying declaration why the documents could not have been produced at the hearing below, we decline to take judicial notice of these final five documents.

## CULPABILITY FINDINGS

### 1. Section 6068 (a) Charges

At the outset, the hearing judge dismissed a number of alleged violations, among them all alleged violations of Business and Professions Code section 6068 (a),[5] on the basis that they were unnecessary. We have held that some violations of the Business and Professions Code are disciplinable under section 6068 (a) as a violation of an attorney's duty to support the laws of California. (See *In the Matter of Trousil* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 229, 237 [§§ 6125 and 6126

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[5] Unless otherwise indicates, all references to section(s) are to the provisions of the Business and Professions Code.

(unauthorized practice of law) culpable under § 6068 (a)]. As we noted in analyzing the scope of section 6068 (a) in *In the Matter of Lilley* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 476, when there is a violation of a section of the State Bar Act which is not, by its terms, a disciplinable offense, there may be grounds for finding a violation of section 6068 (a). (*Id.* at p. 487.)

The Notice to show cause charged respondent with not complying with the fee limitations set forth in section 6146 and the requirements of a written fee agreement and written disclosures required under sections 6147 and 6148. Violation of these statutes is by its terms a disciplinable offense. Accordingly, the State Bar was required to plead a violation of section 6068 (a) as a conduit for alleged violations of sections 6146, 6147 and 6148 and therefore, the section 6068 (a) charges should not have been dismissed.

**2. Illegal Fees (Section 6146 and rule 2-107(A))**

The hearing judge found that respondent had a contingent fee agreement in a medical malpractice case subject to the limitations of section 6146, and he collected an illegal fee in excess of those limits and contrary to former rule 2-107(A).[6]

As we discussed *ante*, section 6146 prohibits an attorney from *either* contracting for *or* collecting a contingent fee in medical negligence case in excess of statutory limits. We reject the testimony of respondent's

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[6] Because the conduct at issue occurred prior to May 27, 1989, references to rules are to the Rules of Professional Conduct in effect between January 1, 1978, and May 26, 1989, unless otherwise indicated.

expert that respondent was innocent of misconduct.[7] We conclude that respondent clearly *collected* an illegal fee exceeding MICRA limits by $266,850 but that the evidence is not clear and convincing that respondent *contracted for* an illegal fee.[8] The hearing judge's finding that respondent had a contingent fee contract violating the MICRA limits is problematic.[9] Respon-

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[7] At the hearing below, Respondent presented the expert testimony of Professor Erwin Chemerinsky of the USC School of Law. Chemerinsky had taught a variety of courses, including constitutional law and professional responsibility. Chemerinsky opined that respondent's fee was not a contingency fee and that respondent did not commit any of the misconduct charged. Chemerinsky's testimony concerned questions of law on the ultimate issues before the hearing judge. Although Chemerinsky could opine on ultimate issues (Evid. Code, §805), those questions are ultimately for the independent decision-making of the State Bar Court and Supreme Court.

[8] The issue's practical significance is as to the amount of excess fee respondent received. If it were held that respondent charged a contingent fee, he received $466,100 in excess of MICRA limits because of a change in the MICRA limits effective January 1, 1988. (See also *Wienholz v. Kaiser Foundation Hospitals* (1989) 217 Cal.App.3d 1501, 1507-1508 [when attorney contracts for a contingent fee in a MICRA case, the maximum collectible fee is set by the version of MICRA in effect at the time the contract was entered].)

[9] As support for his conclusion that respondent entered into a contingent fee agreement, the hearing judge cited a decision from a Florida intermediate appellate court, *Quanstrom v. Standard Guaranty Ins. Co.* (Fla. App. 1988) 519 So.2d 1135, 1136, mod. on other grounds *sub nom. Standard Guaranty Ins. Co. v. Quanstrom* (Fla. 1990) 555 So.2d 828. The *Quanstrom* court did not set forth the specific fee agreement in that case or the statutory language against which it measured the agreement. The Florida Court's discussion suggests that the attorney's agreement was similar to the oral fee agreement respondent entered into here. In *Quanstrom*, the court concluded that the attorney's contract was a contingent fee agreement within the meaning of the Florida law at issue. The State Bar has relied on this case and two others from other states as

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dent had no written fee agreement in this case. Although that situation cannot aid him and it put him at odds with section 6147 (see *post*), the oral contract he created in early 1987 provided for him to receive only those fees which the superior court determined to award if there was a successful result. To be sure, respondent did agree that if his client did not prevail, he would seek no court-awarded fee. Yet in our view, the State Bar did not clearly and convincingly demonstrate a contingent fee agreement within the meaning of section 6146, since at the time of agreement the only evidence in the record showed that fees were to be set as the superior court determined.

However, once the case settled in 1988 and respondent received, upon his application, a fee of 25 percent of the recovery (the superior court's scheduled attorney fee for an incompetent's recovery) and respondent failed to inform the court or his client that MICRA limits could apply to this recovery, he clearly collected a contingent fee under section 6146. The fee he collected exceeded MICRA limits by $266,850.

As respondent surely knew from his intimate familiarity with this area of law, section 6146's prohibition against collecting a contingent fee in excess of stated limits was extremely broad. It applied to representation of *any* person in a medical negligence action for which a contingent fee is collected or contracted for, whether the person represented is a "responsible adult, an infant or a person of unsound mind" and regardless of whether the

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(fn. continued)
supporting the hearing judge's conclusion. We do not consider these out-of-state decisions sufficient authority for us to conclude in this *disciplinary* case that respondent's oral agreement to take as fees whatever the court awarded was a contingent fee agreement subject to MICRA limits, especially given that the matter was not settled in California.

recovery is by "settlement, arbitration or judgment." Not only was respondent's collection of an illegal fee clear; but as we shall discuss, *post*, his failure to reveal the potential applicability of this law to his client's representative and the court frustrated the court's function in passing upon respondent's requested fee and the client's interest in receiving all of the recovery to which she was entitled.

Respondent has advanced two principal theories seeking to defeat the hearing judge's finding that he collected an illegal fee. We consider them in turn and we find them both without merit.

Respondent asserted both in his brief and at oral argument that the doctrine of res judicata bars the conclusion that he collected an improper fee because the propriety of his fees has already been determined by the San Bernardino Superior Court. Respondent's claim is frivolous and its reiteration at oral argument even suggests bad faith on his part. A nearly identical claim was rejected in a civil case in which respondent was a defendant. (*Schultz v. Harney*, *supra*, 27 Cal.App.4th at pp. 1618-1620, filed six days prior to oral argument before us.) *Schultz*, citing, inter alia, *Roa v. Lodi Medical Group, Inc.*, *supra*, 37 Cal.3d at pp.925, 934, held that a superior court's award to respondent of a fee exceeding the MICRA limits was erroneous and that, on the authority of *Fineberg v. Harney & Moore*, *supra*, 207 Cal.App.3d at p. 1050, the client could not waive the MICRA fee limits.

In *Schultz*, the court also held that the doctrine of res judicata did not apply: " . . . Harney and Schultz were not adversaries in the proceedings to approve the settlement of Christopher's claims in the medical malpractice action. To the contrary, Harney was Schultz's attorney and fiduciary. The probate court's approval of Harney's fees, obtained in apparent defiance of a contrary statute

and through a possible breach by Harney of his fiduciary responsibility, cannot serve as the basis of a res judicata bar in this action. Schultz is entitled to seek recovery of that portion of those fees which exceeded the statutory restrictions. [Citation.]" (*Schultz v. Harney*, *supra*, 27 Cal.App.4th at p. 1620.) We agree with the Court of Appeal in *Schultz v. Harney*, that respondent cannot claim any benefit of the doctrine of res judicata in the case before us since he failed to reveal to the superior court the material issue of the potential applicability of MICRA and allowed that court to award him a 25 percent fee without any awareness that MICRA might apply.

Respondent also contends that the settlement amount is larger than the $3.45 million on which respondent sought the award of attorney fees. He contends that his recovery ranged from $21.7 million, the arithmetic sum of all the payments to be made to Wendy over her projected lifetime, to a "present value" calculation made by respondent's expert economist, at between $4.2 and $4.5 million.[10] Respondent argues that under section 6146 (b), attorney's fees are to be calculated on the total value of the periodic payments based on the projected life expectancy of the plaintiff. Respondent ignores the essential point that Wendy's settlement was always treated by the civil court and counsel as one of $3.45 million. He admitted at the hearing that the settlement did not involve periodic payments, but was a "structured settlement" which included both lump sum payments and an annuity payable by the defendants in trust. Therefore, section 6146 (b) does not apply.

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[10] Even if we accepted respondent's present valuation, which we do not, respondent still collected a fee in excess of the limits under section 6146.

The settlement agreement prepared at respondent's direction and the judge's order approving it state the total value of the settlement as $3.45 million. Respondent acknowledged that he calculated his 25 percent fee he submitted for court approval on the $3.45 million figure and Judge Turner testified that he used the same figure to determine if respondent's fee was within the 25 percent probate policy. Respondent's newfound claims that the amount of settlement for attorney fee purposes exceeded $3.45 million are simply without merit. Rejecting respondent's defenses, we hold that he clearly and wilfully violated sections 6068(a) and 6146, and rule 2-107.

### 3. Written Fee Agreement (Section 6147 and 6148)

The hearing judge dismissed charges under section 6147 and section 6148 because neither is a disciplinable offense per se. Both subsections 6147 (b) and 6148 (c) state, "Failure to comply with any provision of this section renders the agreement voidable at the option of the client, and the attorney shall, upon the agreement being voided, be entitled to collect a reasonable fee." The hearing judge reasoned that because both statutes expressly provide that the client could opt to void the fee agreement if an attorney violated either statue, no other remedy was available. The State Bar has not challenged this conclusion on review and, for obvious reasons, neither has respondent.

We have not found any legislative history that is definitive on whether the Legislature intended to make the remedy in section 6147 (b) an exclusive one.[11]

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[11] Assembly Bill 490, which included section 6147, did not discuss possible disciplinary sanctions for a violation. The Legislative Counsel's Digest only noted "[f]ailure to comply with these provi-

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We have recongized that section 6068 (a) is not always the proper vehicle for charging a violation of the State Bar Act when the statute is already covered as a

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(fn. continued)
sions would render the fee agreement viodable at the option of the client." (Legis. Counsel's Dig., Assem. Bill No. 490 (1981-82 Reg. Sess.).) The Senate Judiciary Committee's comment did not consider other remedies beyond the possible voiding of the contract. (Sen. Com. on Judiciary, Analysis of Assem. Bill No. 490 (1981-82 Reg. Sess.) as amended June 11, 1982.)

In 1986, the Legislature considered additional sections to the State Bar Act including section 6148. (Sen. Bill No. 1569 (1985-1986 Reg. Sess.).) The analysis of the bill by the Senate Committee on Judiciary specifically referred to another section of the bill, section 6090.5, as a disciplinable offencse. The bill also added additional subdivisions to section 6068 as duties on attorneys, including requiring an attorney to comply with section 6002.1 (maintaining current address with State Bar). In contrast, the written fee agreement requirement was not discussed as a disciplinable offense or added as a duty under section 6068. (Sen. Com. on Judiciary, Analysis of Sen. Bill No. 1569 (1985-1986 Reg. Sess.) as amended February 24, 1986.) Similarly, the digest by the Assembly Subcommittee on the Administration of Justice also described new section 6090.5 as a disciplinable offense, but did not categorize the new section 6148 as a disciplinable offense. (Assem. Subcom. on Admin. of Justice, Analysis of Sen. Bill No. 1569 (1985-1986 Reg. Sess.) as amended June 10, 1986.)

Assembly Bil No. 2643 (1985-1986 Reg. Sess.), a parallel bill then pending requiring written fee agreements, provided that when an attorney did not comply, he or she had the burden of proving that the client's version of the contract should not previal, but did not discuss any other remedies, such as attorney discipline, either.

The State Bar did not initially support the addition of section 6148 and its board committees had adopted the policy that written fee requirements should not be a disciplineable offense. (State Bar Report of Ad Hoc Bd. of Gov. Com. regarding Sen. Bill No. 1569 [March 1986].) The State Bar later worked closely with Senator Presley, sponsor of Senate Bill No. 1569, to fashion the final bill. (See letter of Hon. Robert Presley, Summary of Provisions of SB 1543 and SB 1569 (1985-86 Reg. Sess.) (April 28, 1986).)

disciplinable offense in another part of the State Bar Act. Thus, in *In the Matter of Lilley, supra*, 1 Cal. State Bar Ct. Rptr. at p. 486, we found that a violation of section 6002.1 should be charged under section 6068 (j) rather than section 6068(a). Nor are we abligated to find that a violation of every statute constitutes grounds for professional discipline. (See *In re Kelley* (1990) 52 Cal.3d 487, 496; *In re Rohan* (1978) 21 Cal.3d 195, 204.)

Both sectiosn 6147 and 6148 set forth standards for attorneys regarding their professional responsibilities to their clients. Apart from the remedy set forth in the statutes, these would appearl to be appropriate areas for attorney regulation. In fact, brach of these obligations under sections 6147 and 6148 could violate Rules of Professional Conduct, such as collection of an illegal fee (current rule 4-200(A)), failure to act competently (current rule 3-110), or failure to communicate significant information to the client (current rule 3-500). Nevertheless, the Supreme Court has indicated that duplicative allegations of misconduct serve little purpose. (*Bates v. State Bar* (1990) 51 Cal.3d 1056, 1060.)

While we consider this to be a very close question, we find that these two statutes, sections 6147 and 6148, should not be considered disciplinable offenses under section 6068 (a).[12] We are influenced by three factors:

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[12] Nothing in our conclusion is intended to be inconsistent with two prior decisions which dealt with either or both of sections 6147 and 6148. In *In the Matter of Collins* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 1, 11, we noted that one of the counts involved a violation of section 6068 (a) and 6147. However, the parties in *Collins* stipulated to those facts and conclusions. There was therefore no issue in dispute with regard to section 6147. In *In the Matter of Hanson* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 703, 714-715, although a violation of section 6148 was not charged, and we assigned no culpability to the surrounding conduct, we made Hanson's failure to comply with the provisions of that statute a basis

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(1) there is a remedy specified in sections 6147 and 6148 for a failure to comply with the provisions of the statutues; and (2) the conduct which underlies breach of an attorney's obligations under sections 6147 and 6148 may be charged as violations of the Rules of Professional Conduct. We also note that (3) the State Bar's Office of the Chief Trial Counsel, the entity responsible for prosecuting ehtical malfeasance, has not challenged this interpretation of the statute. This does not preclude us from considering whether respondent's failure to prepare a written fee agreement is an aggravating circumstance in deciding the appropriate discipline. (See *post*.)

**4. Failure to Refund Fee (Rule 4-100(B)(4) and Section 6106)**

The hearing judge determined that respondent had failed to return the illegal portion of the fees in response to Mulligan's demand in June 1989 and the refusal constituted a wilful violation of current rule 4-100 (B)(4). He did not find that the failure to refund constituted an act of moral turpitude or dishonesty contrary to section 6106 because respondent held an honest but mistaken belief that he was entitled to the entire sum awarded. Further, the hearing judge did not consider the rule violation in making his discipline recommendation because of respondent's good faith belief in his entitlement to the funds. On review, the State Bar does not challenge othe hearing judge's conclusion that retention of the funds did not violate section 6106 but submits that

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for attending the State Bar's Ethics School. Given the prophylactic, remedial nature of conditions of probation, that recommendation does not conflict with our decision here.

the hearing judge could not ignore culpability conclusions which are not duplicative of other findings.

Once a violation of ethical duties is found, a hearing judge must examine the circumstances surrounding the violation and consider either the good or bad faith of respondent in mitigation or aggravation. (Trans. Rules Proc. of State Bar, div. V, Standards for Attorney Sanctions for Professional Misconduct, stds. 1.2(e)(ii) and 1.2(b)(iii) ["std."].) The hearing judge should not have disregarded the culpability finding with respect to rule 4-100(B)(4); and for the same reasons, as we discuss below, should have also found a section 6106 violation based on gross neglect. It was within his discretion to mitigate the misconduct based on the same reasons he gave for not wanting to consider the violation.

**5. Failure to Disclose MICRA to Client and Court (Sections 6068(b), 6068(d), 6106, rule 7-105)**

Based on his assessment of respondent's credibility, the hearing judge concluded that respondent held an honest but unreasonable belief that section 6146 and the other MICRA requirements were not applicable to the Paulis case and as a result of this erroneous and unreasonable belief, he failed to disclose the MICRA limitations to Mrs. Paulis and to the Judge Turner. The hearing judge found the remaining circumstantial evidence insufficient to find that respondent misled the court and his client, contrary to sections 6068(b) (proper respect for courts), 6106 (act of dishonesty or moral turpitude), or 6068 (d) or former rule 7-105 (duty not to mislead judge by artifice or false statement). The State Bar does not contest the hearing judge's dismissal of the charge, but argues that doubts about respondent's good

faith in not revealing the MICRA limitations should be considered as evidence in aggravation.

The hearing judge's credibility findings are entitled to great weight, given that he was in the best position to observe respondent's demeanor while testifying. (See *Connor v. State Bar* (1990) 50 Cal.3d 1047, 1056.) However, under the facts in this case, including the materiality of MICRA and respondents superior knowledge of MICRA issues, we find that respondent' failure to reveal the MICRA limitations was not reasonable under the circumstances and misled both the court and his client on a material matter to the detriment of his client and for respondent's own gain. Therefore, we find respondent violated these ethical requirements, although out of deference to the credibility findings of the hearing judge, we hold that respondent's violations occurred through gross neglect rather than intentional dishonesty.

Respondent's argument that he did not have the duty to disclose the possible application of a statute has been heard in other cases where similarly material information has been withheld. In *Di Sabatino v. State Bar* (1980) 27 Cal.3d 159, an attorney failed to disclose to a bail commissioner that he had made two other bail reduction motions that same day which had been denied. The commissioner testified he would not have reduced bail if he had known of the earlier denials. The attorney contended that the commissioner knew or should have known that bail had been set or otherwise addressed earlier. The attorney asserted that he was under no duty to disclose the prior denials to the bail commissioner and that he would have disclosed the information had the commissioner asked him. Any failings on his part were the result of negligence.

The Supreme Court rejected these arguments. It held that the concealment of material facts was just as misleading as explicit false statements and constituted

misconduct warranting discipline. It emphasized that the attorney had a duty to disclose fully and completely all relevant facts and circumstances regarding his request and was not relieved of that affirmative duty merely because the commissioner did not inquire about prior proceedings. The proximity of the prior denials to the bail reduction motion rebutted the attorney's contention that his actions were neither intentional nor willful. (*Di Sabatino v. State Bar*, *supra*, 27 Cal.3d at pp. 163-164.)

In *Arm v. State Bar* (1990) 50 Cal.3d 763, an attorney who was to begin a 60-day disciplinary suspension shortly, concealed it from a judge in discussions concerning an upcoming court appearance and compounded his misconduct by affirmatively representing that he might be available to appear on the first day of his suspension. The Supreme Court rejected the attorney's excuses that (1) since he was not required by his suspension order to advise his client or opposing counsel of the suspension under rule 955, California Rules of Court, it was proper to conceal it; (2) he was afraid that it would be used to his client's disadvantage by opposing counsel, and (3) the juvenile court would have made the same determination had it known of his suspension. The Court held that the attorney had a duty to disclose his forthcoming suspension and that it was a factor for the juvenile court judge, not the attorney, to weigh. The client's interest in continuing the attorney's representation through his suspension did not necessitate or justify concealing the suspension order. (*Id.* at pp. 775-776.)

In this case, Judge Turner testified both to the materiality of the information suppressed and the different course the judicial proceedings would have taken had the MICRA limitations been disclosed. The extremely large ($266,850 or 46 percent) difference between the fee permitted under MICRA versus that requested under

a straight 25 percent rate, would have had a significant impact on the client's share of the recovery. Accepting that respondent may have believed he was acting properly, the circumstances support only the conclusion that respondent was grossly negligent in withholding from the court and his own client the potential applicability of the MICRA fee limits.

Respondent was obligated to justify his fee request under the law applicable to medical negligence cases. Respondent's prior litigation experience and unquestioned, superior expertise regarding the application of MICRA and his knowledge of the disciplinary proceeding then pending in the State Bar Court challenging his fees in a court-ordered settlement of a medical malpractice case were sufficient notice to respondent that the limitations of section 6146 were relevant to his fee request in this case.[13] Respondent cannot claim ignorance of the law, and cannot shift the responsibility for mentioning the possible application of MICRA from himself to the court. He had a duty both to the court and to his client to advise them that the MICRA limitations

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[13] In the case holding section 6146 constitutional, *Roa v. Lodi Medical Group, Inc.*, *supra*, 37 Cal.3d 920, the plaintiffs included a minor child and court approval was necessary for the settlement. There was no written fee agreement but an "understanding" that the attorney fees would be 25 percent of the net recovery, if successful. The trial court concluded that it was compelled to award attorney fees in accordance with section 6146 and rejected the plaintiffs' request for higher fees and their constitutional challenges to MICRA. The Supreme Court affirmed. Thereafter, the Court of Appeal ruled that a trial court did not have the power to order extraordinary attorney fees in excess of the MICRA limits. (*Hathaway v. Baldwin Park Community Hospital* (1986) 186 Cal.App.3d 1247.) Respondent's arguments that his fee "understanding" did not come under MICRA and that the probate court guidelines overrode any MICRA limits were not, therefore, a reasonable interpretation of the state of the law as of July 1988.

might be applicable to his fee request, especially since section 6146 (a) applied MICRA limits whether the patient was a responsible adult, an infant or a person of unsound mind. If he thought he had reasonable grounds to distinguish his situation from the ambit of the statute, he could have argued them to Judge Turner. Instead, he chose to keep material information from the court and his client. In effect, he placed his own interests in a large fee ahead of those of his client and misled the court. We find that by withholding this material information, respondent breached his duties to the court and his client and wilfully violated sections 6068 (b), 6068 (d), and 6106 and rule 7-105, through gross negligence.

**6. Selective Prosecution**

Respondent argues that the State Bar has acted vindictively and unfairly in pursing disciplinary actions against him. He charges that the State Bar has filed patently frivolous charges and has abused its discretion in carrying out its responsibilities. In rejecting a similar claim of selective prosecution last year in our decision in *In the Matter of Riley* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 91, 107-108, we said in part: "It is by no means self-evident that selective prosecution may be raised as a defense in State Bar disciplinary proceedings, in which respondents do not enjoy the full panoply of procedural protection afforded to criminal defendants. (*In the Matter of Bach* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 631, 645, citing *Goldman v. State Bar* (1977) 20 Cal.3d 130, 140.) But even if selective prosecution were a valid defense in State Bar proceedings, respondent's claim could not succeed. Respondent cites no authority, nor are we aware of any, holding that a claim of selective prosecution may be premised on asserted discrimination due to notoriety rather than on a constitu-

tionally prohibited basis such as race (see *People v. Harris* (1960) 182 Cal.App.2d Supp. 837), sex (see *People v. Municipal Court (Street)* (1979) 89 Cal.App.3d 739, 745), or the exercise of constitutional rights. (See, e.g., *People v. Serna* (1977) 71 Cal.App.3d 229, 233-235 [First Amendment rights]; *Murgia v. Municipal Court* [(1975)] 15 Cal.3d [286,] 301-303 [freedom of association in form of union membership].)" (Fn. omitted.) For the reasons we gave in *Riley*, we hold that respondent's claim is without merit. There is no allegation that the prosecution was based on, e.g., race, gender, or the exercise of constitutional rights. Respondent has not established that the State Bar's failure to prove all of its charges is sufficient to show an invidiously discriminatory prosecution. We conclude that respondent has not proved his claim of selective prosecution.

## DISCIPLINE

### 1. Evidence in Mitigation and Aggravation

In mitigation, respondent presented a number of witnesses who testified to respondent's good character and long record of accomplishments. Transcripts of testimony from numerous appellate and trial judges offered in mitigation at a prior disciplinary proceeding were offered as well. Respondent is an acknowledged leader in the field of medical negligence and product liability litigation and is a member and honoree of a number of professional organizations. The hearing judge found him candid and cooperative with the State Bar and accorded mitigating weight to respondent's very long record of practice without discipline, prior to his 1990 public reproval.

The hearing judge identified two factors in aggravation: harm to respondent's client and the public, and

respondent's prior record of discipline. He discounted the significance of the harm to the client by contrasting the amount of the excess fee, $466,100, or $266,850 by our findings, to the size of the overall recovery for the client, $3.45 million. He declined to find respondent's prior record of discipline to be aggravating because the reproval was issued in January 1990, after respondent had collected the unlawful fee in this case.

Challenging the hearing judge's determination not to consider respondent's prior disciplinary record, the State Bar cites to our decision in *In the Matter of Sklar* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 602. In *Sklar*, citing Supreme Court decisions, we observed that a prior record of discipline is a proper factor in aggravation, regardless of when the discipline was imposed. (*Id.* at p. 618.) If the instant misconduct occurred in the same time period as the discipline, then the aggravating force of the prior record may be diminished. (*Id.* at p. 619.)

Respondent was publicly reproved for collecting $108,333 in fees in excess of MICRA limitations on a 1982 settlement, in violation of sections 6068 (a) and 6146, and former rule 2-107(A). Respondent entered into a contingent fee agreement with Richard and Martha Koskoff on or about May 23, 1980, to represent them and their infant son in a medical malpractice action for a fee of 25 percent of any recovery. The case settled for $1 million, including $250,000 in attorneys fees for respondent, and the settlement was approved by a superior court judge. In April 1985, shortly after the Supreme Court decision in *Roa v. Lodi Medical Group, Inc.*, *supra*, 37 Cal.3d 920, the Koskoffs requested a refund of the difference between the maximum fee under MICRA ($141,667) and the fee respondent received. Respondent countered that it was a court-awarded fee not subject to MICRA. The Koskoffs filed suit against

respondent and also complained to the State Bar. The formal charges in the Koskoff matter were filed in the State Bar Court on March 10, 1988, and the hearing referee's decision was filed on April 20, 1989. The public reproval was effective March 19, 1990.

Respondent's misconduct in the present case occurred between the filing of the formal charges in the Koskoff case and the hearing referee's decision in April 1989. Similar misconduct was involved in both. With the filing of the formal charges in the Koskoff case, respondent had notice that the State Bar considered his collection of fees in court-awarded settlements in excess of MICRA limits to be ethically questionable. Therefore, we consider respondent's prior record of discipline to be aggravating evidence.

We also consider the harm to the client and the administration of justice to be significant. (Std. 1.2(b)(iv).) Certainly, the large difference between the fee respondent received and the fee he was entitled to collect gave him an interest adverse to that of his client. Disclosure of the MICRA limits could have deprived him of a larger fee to which he believed he was entitled. In light of his recognized expertise, his persistent claim that he was not obligated to discuss every law in every book in his extensive law library with his client and the judge regarding their possible application in the Paulis case is frivolous and betrays disdain for his client and the trial court.

This case makes real the unlikely risk that the Supreme Court noted ten years ago in *Waters v. Bourhis*, *supra*, 40 Cal.3d at p. 438, fn. 13, that attorneys would act against client interests in disregarding the limits of MICRA: "The risk that section 6146 will be undermined in this fashion, however, assumes that plaintiffs' attorneys will routinely act against their own clients' interests, interposing frivolous or extremely weak

non-MICRA theories simply to increase their own contingency fees at the expense of their clients. Although we assume that plaintiffs' attorneys will be quite innovative in attempting to devise non-MICRA theories when they believe in good faith that such innovation will work to their clients' benefits, we cannot properly assume that they will adopt such tactics when it is simply in their own interest and contrary to their clients' interest, for such conduct would violate their professional obligations to their clients."

Respondent's failure to comply with the disclosure and writing requirements of section 6147 also resulted in harm to his client. The statute was designed to further disclosure of this important information to the client *in writing* to avoid the very problems presented in this case.

We also conclude that respondent's persistent attempts, as late as oral argument before us, to portray himself as the victim of uncertain MICRA law is also aggravating as a demonstration of lack of candor in view of his superior knowledge of that legal subject.

**2. Comparable Case Law**

There is one illegal fee case on which the Supreme Court has written. In *Coviello v. State Bar* (1953) 41 Cal.2d 273, in an industrial accident case, the attorney was limited by statute to $75 fee awarded as part of a compromised claim of $765 before the Industrial Accident Commission. Pursuant to his fee agreement with the client, the attorney retained an additional $170 from the settlement above the fee authorized. The Court found the collection of the fees in excess of those permitted by law warranted discipline. Because the attorney had no prior record of discipline, he received a 30-day actual suspension.

The State Bar cites to a number of cases dealing with the charging and collection of unconscionable fees. Under rule 4-200, the unconscionability of a fee is to be determined based on a number of factors. Applying a significant factor, the fee which respondent collected did not appear to be out of proportion to the value of services rendered; and in *In the Matter of Riley, supra*, 3 Cal. State Bar Ct. Rptr. at p. 117, fn. 28, we noted that standard 2.7's proposal of a six-month minimum actual suspension applied only to unconscionable fees under former rule 2-700 and not illegal fees. Although this is not an unconscionable fee case under rule 4-200, the Supreme Court has expressed concern over attorney conduct when focus on fee collection overcomes attention to professional responsibilities to one's client. In *Bushman v. State Bar* (1974) 11 Cal.3d 558, 564, a case involving, inter alia, the charging of an unconscionable fee to an impecunious client, the Court observed that "the right to practice law 'is not a license to mulct the unfortunate.' " (See also *Hulland v. State Bar* (1972) 8 Cal.3d 440, 449 [in a case involving, inter alia, the use of a confession of judgment to collect unearned fees from one's own client, the Court observed that "Surely the legal profession is more than a mere 'money getting trade' . . . ."].)

The gravamen of this case is not simply respondent's collection of an illegal fee for his representation of Wendy. Rather, this case is about respondent's clear overreaching of his own client by concealing by recklessness or gross neglect from her representative and from the court a material fact and profiting handsomely as a result. Respondent apparently believed that his duty to his client was confined solely to obtaining a successful recovery for her. While that was most important to his client, his duty did not end there as the Supreme Court made clear a decade ago in *Waters v. Bourhis*,

*supra*, 40 Cal.3d at p. 438 fn. 13, a case with which respondent, as amicus curiae, was intimately familiar. As attorney for Wendy, respondent had a duty of utmost good faith and fidelity to her. (See, e.g., *Greenbaum v. State Bar* (1976) 15 Cal.3d 893, 903; *Cutler v. State Bar* (1969) 71 Cal.2d 241, 251.) As the Court stated in *Hulland v. State Bar*, *supra*, 8 Cal.3d at p. 448, "When an attorney, in his zeal to insure the collection of his fee, assumes a position inimical to the interests of his client, he violates his duty of fidelity to his client. [Citations.]"

Respondent's duties required him to advise Wendy's representative candidly of the application of the MICRA fee limits which had been well settled in litigation by that time. Given respondent's very expertise, a client would understandably look to him not only for the most diligent substantive representation but to protect the client's interest in ensuring that all of the recovery which was the client's share went to the client. Respondent's collection of $266,850 more than he was entitled to receive as his attorney fees under a statute designed to benefit his severely disabled client, was a patent breach of his duty of good faith and fair dealing to his client and a very serious aggravating circumstance, notwithstanding that under prior law the fee might have been collectible.

Respondent also had a duty of candor to the superior court. (E.g., § 6068 (d); rule 5-200; former rule 7-105.) Although respondent was entitled to urge any creative theory in good faith that the MICRA limits might not apply to this case, he could not simply conceal from the court a material fact and profit sizably thereby at the expense of his client.

The State Bar contends that the hearing judge's 30-day actual suspension recommendation is well supported by the standards and case law; and, if anything, is lenient. However, the State Bar does not suggest a

particular degree of discipline which we should recommend.

There are past decisions which can serve as guidelines for individual aspects of respondent's misconduct. However, we find no similar decision presenting the totality of factors here. We are aware that past cases of simple charging or collecting of illegal fees in excess of MICRA limits are unreported but have generally resulted in public reproval, the result reached in respondent's 1990 discipline. We acknowledge that this is not an unconscionable fee case, but respondent's abdication of duties to his client and the court resulting in his receipt of a fee sizably above legal limits makes it difficult to justify less than the minimum six-month actual suspension proposed by standard 2.7 even without regard to the factors below.

A critical aspect of this case is respondent's withholding, through gross neglect, of a sizable amount of funds due his disabled client. Had respondent been found culpable of intentional or dishonest withholding of funds, the issue on degree of discipline would be whether mitigating circumstances would outweigh the general rule of disbarment for such offense. (See *Edwards v. State Bar* (1990) 52 Cal.3d 28, 37.) Cases of misconduct involving funds improperly held for reasons other than dishonesty have typically resulted in actual suspension for varying degrees even when the attorney had no prior record of discipline. (See *Kelly v. State Bar* (1991) 53 Cal.3d 509 [two matters involving relatively small sums not involving dishonesty or intent to harm clients; no prior record of discipline in 13 years of practice; three year suspension stayed on condition of 120 days actual suspension]; *Sugarman v. State Bar* (1990) 51 Cal.3d 609 [two matters, one involving misappropriation due to gross neglect, the other involving acquisition of an interest adverse to a client prohibited

by former rule 5-101; several mitigating factors considered, including improvement of office practices; three year suspension stayed on conditions of actual suspension for one year].)

Ultimately, the appropriate degree of discipline to recommend rests on a balanced consideration of all relevant factors. (See, e.g., *Grim v. State Bar* (1991) 53 Cal.3d 21, 35; *In the Matter of Twitty* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 664, 676.) Attorney discipline is imposed not as punishment but to protect the public, preserve public confidence in the courts and legal profession and maintain the integrity of the legal profession. (See std. 1.3; see also, e.g., *In re Kelley, supra*, (1990) 52 Cal.3d at p. 493; *In the Matter of Broderick* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 138, 157.)

One of the factors recognized by the Supreme Court in assessing the appropriate degree of discipline is the extent to which the attorney has achieved appropriate insight into his misconduct. (*Conroy v. State Bar* (1990) 51 Cal.3d 799, 806; *Rodgers v. State Bar* (1989) 48 Cal.3d 300, 317; *Carter v. State Bar* (1988) 44 Cal.3d 1091, 1100.) Regrettably it appears from this record as well as from the appellate decisions we have judicially noticed, that respondent has been sued four times by clients based on his collection of fees in excess of MICRA limits. Both appellate decisions in these cases of which we are aware were adverse to respondent and yet he persists in defending his actions. We have grave concern that unless significant discipline is imposed, he will continue to ignore the law and his duties to his clients of utmost good faith and fair dealing and repeat his misconduct.

We also consider that the conduct which culminated in respondent's serious misconduct, including failure to reveal the limitations of MICRA to the court and his

client, undoubtedly had its origin in respondent's passionate belief that MICRA unfairly limited the fees of members of the State Bar when practicing in the field of medical negligence. Nevertheless, as one of the most experienced practitioners in this field, whose career at the bar spanned 40 years, respondent had no excuse for allowing his intense dislike of MICRA to blind him to his obligations to client and court several years after the courts had resolved basic MICRA fee limit issues against respondent's position. Indeed, because of his stature as a professional, his conduct should have been an ethical model to others. Sadly, it was not. Meaningful suspension, including six months actual suspension and compliance with rule 955, is appropriate to adequately protect the public and maintain public confidence in the legal profession.

### 3. Recommended Discipline

We therefore recommend that respondent be suspended from the practice of law for two years, that the suspension be stayed, and that he be placed on probation for two years on conditions, including six months actual suspension.

In his prior disciplinary case, the hearing referee recommended that respondent be given a two-year stayed suspension, and placed on probation for two years subject to probation conditions, including restitution. The level of discipline was reduced by the former volunteer review department to a public reproval and the restitution conditions were altered, but the remaining conditions recommended by the hearing referee were imposed as part of respondent's public reproval. Respondent was required to revise his form retainer agreement for medical negligence cases to show no fees in excess of those permitted by section 6146 and present

to the State Bar's office of Chief Trial Counsel for prior review and approval all executed retainer agreements for medical negligence cases. We believe in light of this case and respondent's continued assertion that section 6146 did not apply to his fees in the Paulis litigation, that this additional condition should be applied to this case as well.

Accordingly it is recommended that as a condition of his probation, respondent shall provide written retainer agreements to all of respondent's medical negligence plaintiff clients who are not paying respondent on an hourly basis, which agreements shall disclose the fee schedule of section 6146 and state that this fee schedule is the maximum that respondent may charge and that the client and respondent may negotiate a lower rate. (§ 6147 (a)(5).) In the cases of minors and incompetents, a declaration making the same disclosures shall be presented to the judge of the appropriate probate court at the same time that petitions for attorney representation or attorney fees are presented for approval. Respondent shall report this compliance with the foregoing in each quarterly report respondent is required to submit to the State Bar's probation department.

We adopt the remaining conditions of probation recommended by the hearing judge below, including, within one year from the date of the Supreme Court's disciplinary order in this matter, restitution to the conservator of the estate of Wendy Paulis (or the Client Security Fund, if it has paid the conservator) of $266,850, plus interest thereon at the rate of 10 percent per annum from July 8, 1989 until paid. Consistent with our recommended period of actual suspension, we also recommend that respondent be ordered to comply with the requirements of rule 955 of the California Rules of Court within 30 days of the effective date of the Supreme Court order in this matter, and file the affidavit

provided for in paragraph (c) within 40 days of the effective date of the order showing his compliance with said order. Finally, we recommend that costs be awarded to the State Bar pursuant to section 6086.10 and that such costs be added to and become part of the membership fee of respondent for the calendar year following the effective date of the Supreme Court order.

STOVITZ, J.

We Concur:

PEARLMAN, P.J.

GEE, J.*

---

* By appointment of the Presiding Judge pursuant to rule 453(c), Trans. Rules Proc. of State Bar.

Case No. 90-0-14277

In the Matter of

David M. Harney

HEARING DEPARTMENT JUDGE:
Hon. Christopher Smith

COUNSEL FOR PARTIES

STATE BAR OF CALIFORNIA:
Allen L. Blumenthal, Esq.
Office of Trial Counsel
1149 S. Hill Street
5th & 6th Floors
Los Angeles, CA 90015-2299
(213) 765-1400

FOR RESPONDENT:
Thomas Kallay, Esq.
Law Ofc. David M. Harney
201 N. Figueroa Street
Suite 1300
Los Angeles, CA 90012
(213) 482-0881

## DECLARATION OF SERVICE

[Rule 62, Rules Proc. for State Bar Ct. Proceedings;
Code Civ. Proc., § 1013a(4)]

I am a Deputy Court Clerk of the State Bar Court. I am over the age of eighteen and not a party to the within proceeding. In the City and County of Los Angeles, on the date shown below, I deposited a true copy of the following document

OPINION ON REVIEW FILED APRIL 4, 1995

in a sealed envelope as follows:

[X] with first-class postage thereon fully prepaid in a facility regularly maintained by the United States Postal Service at Los Angeles, California, addressed as follows:

THOMAS KALLAY ESQ.
LAW OFFICE DAVID M HARNEY
SUITE 1300
201 N FIGUEROA STREET
LOS ANGELES CA 90012

[ ] by certified mail, with a return receipt requested, in a facility regularly maintained by the United States Postal Service at Los Angeles, California, addressed as follows:

[X] in an interoffice mail facility regularly maintained by the State Bar of California addressed as follows:

ALLEN L BLUMENTHAL ESQ

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at Los Angeles, California, on April 4, 1995.

/s/ Sonia Sotomayer
Sonia Sotomayer
Deputy Court Clerk
Review Unit

# APPENDIX C

REVIEW DEPARTMENT OF THE
STATE BAR COURT

**FILED**
MAY 30 1995
State Bar Court
Clerk's Office
Los Angeles

In the Matter of

DAVID M. HARNEY

A Member of the State Bar

---

No. 90-014277

ORDER DENYING RECONSIDERATION

BY THE DEPARTMENT:*

After filing of our opinion in this matter, Respondent, David M. Harney, sought reconsideration on several grounds. He accompanied his request with voluminous appendices ("appendices") consisting of legislative history and character references from a prior State Bar proceeding. The State Bar's Office of the Chief Trial Counsel (State Bar) opposes reconsideration. It also requests that we strike from the record respondent's appendices. On May 10, 1995, respondent sought leave

---

* Before Pearlman, P.J., Stovitz, J. and Gee, J.**

** Honorable Jennifer Gee, Hearing Department Judge of the State Bar Court, sitting by designation of the Presiding Judge pursuant to former rule 453(c), Transitional Rules of Procedure of the State Bar.

to file a reply to both the State Bar's opposition and its request to strike his appendices.

Good cause having been shown, and the State Bar having no opposition, respondent's request to file a reply is GRANTED. Respondent's motion for reconsideration is DENIED and the State Bar's request that we strike respondent's appendices is GRANTED.

## DECLARATION OF SERVICE

[Rule 62 Rules Proc. for State Bar Ct. Proceedings;
Code Civ. Proc., § 1013a(4)]

I am a Deputy Court Clerk of the State Bar Court. I am over the age of eighteen and not a party to the within proceeding. In the City and County of Los Angeles, on the date shown below, I deposited a true copy of the following document

ORDER DENYING RECONSIDERATION,
FILED MAY 30, 1995.

in a sealed envelope as follows:

[x] with first-class postage thereon fully prepaid in a facility regularly maintained by the United States Postal Service at Los Angles, California, addressed as follows:

THOMAS KALLY ESQ
LAW OFFICE OF DAVID M HARNEY
201 NORTH FIGUEROA STREET, #1300
LOS ANGELES CALIFORNIA 90012

ROBERT H POURVALI ESQ
LAW OFFICE OF DAVID M HARNEY
201 NORTH FIGUEROA STREET, #1300
LOS ANGELES CALIFORNIA 90012

[-] by certified mail, with a return receipt requested, in a facility regularly maintained by the United States Postal Service at Los Angeles, California, addressed as follows:

N/A

[x] in an interoffice mail facility regularly maintained by the State Bar of California addressed as follows:

ALLEN L BLUMENTHAL ESQ

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at Los Angeles, California, on May 30, 1995.

/s/ Shemainee C. Carranza
Shemainee C. Carranza
Deputy Court Clerk
State Bar Court

# APPENDIX D

-D 1-

S047253

SBC 90-0-18203

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

SUPREME COURT
**FILED**
APR 25 1996
Robert Wandruff Clerk
/s/ H. Cruz
Deputy

IN RE DAVID M. HARNEY ON DISCIPLINE

Petition for writ of review is denied.

It is ordered that David M. Harney be suspended from the practice of law for two years, that execution of suspension be stayed, and that he be placed on probation for two years subject to the conditions of probation, including six months actual suspension and restitution, recommended by the Review Department of the State Bar Court in its decision filed April 4, 1995, as modified by its order of April 10, 1995. It is further ordered that he comply with rule 955, California Rules of Court, and that he perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 days respectively, after the date this order is effective.* Costs are awarded to the State Bar and shall be added to and become part of the membership fee for the next calendar year. (Bus. & Prof. Code section 6140.)

* (See Bus. & Prof. Code section 6126, subd.(c).)
Lucas, C.J. and George, J. did not participate.

/s/ Kennard
Acting Chief Justice

-D 3-

S047253

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

SUPREME COURT
**FILED**
MAY 7 1996
Robert Wandruff Clerk

_____
Deputy

---

IN RE DAVID M. HARNEY ON DISCIPLINE

---

The order denying a writ of review, issued on April 25, 1996, is amended to add the following final paragraph:

"Mosk, J. is of the opinion the petition should be granted."

Kennard
Acting Chief Justice

# APPENDIX E

[State letterhead and seal omitted.]

SUPREME COURT OF CALIFORNIA
San Francisco, California
Robert F. Wandruff
Court Administrator and
Clerk of the Supreme Court

May 10, 1996

Mr. Robert H. Pourvali
Law Offices of David Harney
201 N. Figueroa Street
Suite 1300
Los Angeles, CA 90012-2636

Re: S047253 - In re David M. Harney on Discipline

Dear Mr. Pourvali:

Returned unfiled is your "Petition for Reconsideration of Order" received today. The order of this court filed April 25, 1996, denying the petition for writ of review, was final forthwith and may not be reconsidered.

Very truly yours,

ROBERT F. WANDRUFF
Court Administrator and
Clerk of the Supreme Court

By: John C. Rossi
Assistant Clerk-
Administrator

JCR:sf
Enclosure
cc: L.A.

[State letterhead and seal omitted.]

SUPREME COURT OF CALIFORNIA
San Francisco, California
Robert F. Wandruff
Court Administrator and
Clerk of the Supreme Court

May 10, 1996

David M. Harney, Esq.
201 N. Figueroa Street
Suite 1300
Los Angeles, CA 90012

Re: S047253 - In re Harney on Discipline

Dear Sir:

On May 10, 1996 our San Francisco Office returned a duplicate of this pleading. You were advised this matter is final and may not be reconsidered.

Very truly yours,

ROBERT F. WANDRUFF
Court Administrator and
Clerk of the Supreme Court

/s/ Robert D. Barrow
By: Robert D. Barrow
Chief Clerk

enclosure

cc: s.f.
State Bar

# APPENDIX F

# UNITED STATES CONSTITUTION

## AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

## AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

# APPENDIX G

# CALIFORNIA BUSINESS AND PROFESSIONS CODE

§ 6146. Limitations; periodic payments

(a) An attorney shall not contract for or collect a contingency fee for representing any person seeking damages in connection with an action for injury or damage against a health care provider based upon such persons' alleged professional negligence in excess of the following limits:

(1) Forty percent of the first fifty thousand dollars ($50,000) recovered.

(2) Thirty-three and one-third percent of the next fifty thousand dollars ($50,000) recovered.

(3) Twenty-five percent of the next five hundred thousand dollars ($500,000) recovered.

(4) Fifteen percent of any amount on which the recovery exceeds six hundred thousand dollars ($600,000).

The limitations shall apply regardless of whether the recovery is by settlement, arbitration, or judgment, or whether the person for whom the recovery is made is a responsible adult, an infant, or a person of unsound mind.

(b) If periodic payments are awarded to the plaintiff pursuant to Section 667.7 of the Code of Civil Procedure, the court shall place a total value on these payments based upon the projected life expectancy of the plaintiff and include this amount in computing the total award from which attorney's fees are calculated under this section

(c) For purposes of this section:

(1) "Recovered" means that net sum recovered after deducting any disbursements or costs incurred in connection with prosecution or settlement of the claim.

Costs of medical care incurred by the plaintiff and the attorney's office-overhead costs or charges are not deductible disbursements or costs for such purpose.

(2) "Health care provider" means any person licensed or certified pursuant to Division 2 (commencing with Section 500), or licensed pursuant to the Osteopathic Initiative Act, or the Chiropractic Initiative Act, or licensed pursuant to Chapter 2.5 (commencing with section 1440) of Division 2 of the Health and Safety Code; and any clinic, health dispensary, or health facility, licensed pursuant to Division 2 (commencing with Section 1200) of the Health and Safety Code. "Health care provider" includes the legal representatives of a health care provider.

(3) "Professional negligence" is a negligent act or omission to act by a health care provider in the rendering of professional services, which act or omission is the proximate cause of a personal injury or wrongful death, provided that the services are within the scope of services for which the provider is licensed and which are not within any restriction imposed by the licensing agency or licensed hospital.

Supreme Court, U.S.
FILED
JUL 1 1996
CLERK

No. 95-1942

IN THE

*SUPREME COURT OF THE UNITED STATES*

October Term, 1995

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DAVID MORAN HARNEY, *Petitioner*

v.

THE STATE BAR OF CALIFORNIA, *Respondent*

---

To Petition for Writ of Certiorari to the
Supreme Court of the State of California

---

# BRIEF OF RESPONDENT IN OPPOSITION

DIANE C. YU
LAWRENCE C. YEE*
MARK TORRES-GIL
555 Franklin Street
San Francisco, CA 94102
Telephone: (415) 561-8200

*Attorneys for Respondent*

* Counsel of Record

26 pp

## QUESTIONS PRESENTED

(1) Whether the California Supreme Court's order of discipline against an attorney based on findings of numerous ethical violations raises an important federal question which should be decided by this Court?

(2) Whether the California Supreme Court's determination that Petitioner should be disciplined raises Due Process or Equal Protection questions.

TABLE OF CONTENTS PAGE

STATEMENT OF THE CASE ..... 1

A. Procedural History ..... 5

B. Statement of Facts ..... 8

REASONS FOR DENYING THE WRIT ..... 13

A. The California Supreme Court's Determination that Petitioner Should Be Disciplined Does Not Raise Important Federal Questions .... 13

B. Petitioner's Claim That He Has Been Disciplined For An Uncharged Ethical Offense Is Meritless ..... 14

C. The Evidence Strongly Supports The Order of Discipline Notwithstanding Petitioner's Groundless Assertions That He Demonstrated An Uncontradicted Good Faith Belief In His Actions ..... 17

D. Petitioner's Claim That He Was Deprived of "Property" Without Due Process In Violation Of the Fifth Amendment Is Belied By The Record ..... 18

E. Petitioner's Claim That He Has Been Denied Equal Protection Of The Laws Based On A Subjective And Conclusory Assertion That The Statute He Violated No Longer Serves A Legitimate State Purpose Is Clearly Meritless ..... 19

CONCLUSION ..... 20

## TABLE OF AUTHORITIES

PAGE

### CASES


Asbury Hosp. v. Cass County, 326 U.S. 207
66 S.Ct. 61 (1945) ..... 20

Dahlman v. Sate Bar
50 Cal.3d 1088 (1990) ..... 15

Fineberg v. Harney & Moore, 207 Cal.App.3d 1049
review den. (4/26/89) ..... 10

In Re Ruffalo, 390 U.S. 544
88 S.Ct. 1222 (1968) ..... 16

Matter of Jacobs
44 F.2d 84, 89-90 (2nd Cir. 1994) ..... 15, 18

Railway Express Agency, Inc. v. New York
336 U.S. 106, 69 S.Ct. 463 (1949) ..... 19, 20

Read v. State Bar, 53 Cal.3d 394 (1991) ..... 17

Rosenthal v. Justices of the Supreme Court of
California, 910 F.2d 561 (9th Cir. 1990) . 15, 18

Schultz v. Harney, 27 Cal.App.4th 1611
review den. (12/21/94) ..... 9

United States v. Fallon, 407 F.2d 661 (C.A. Ill.)
cert. den. 395 U.S. 908 (1969) ..... 20

## CODES

California Business & Professions Code
§ 6146 ..... 9

California Code of Civil Procedure
§ 372 ..... 11

California Probate Code
§ 3302 11

## RULES

California Rules of Court
Rule 954(b) ..... 1

Rules of the Supreme Court of the United States
Rule 10 ..... 13
Rule 10(b) ..... 14
Rule 10(c) ..... 14

San Bernardino Supreme Court Rules
Rule 1111 ..... 11

## STATEMENT OF THE CASE

Petitioner, David Moran Harney, ("Petitioner") is an attorney who has been suspended from the practice of law by Order of the California Supreme Court following a disciplinary proceeding in the State Bar Court of the State Bar of California. In the State Bar Court proceedings, Petitioner was afforded an evidentiary hearing by the Hearing Department of the State Bar Court and review of the Hearing Department's decision by the Review Department of the State Bar Court. Petitioner seeks a writ of certiorari to review the California Supreme Court's Order, issued April 25, 1996 (as amended May 7, 1996), denying his petition for review of the order of suspension.[1]

---

[1] Pursuant to Rule 954(b), California Rules of Court, a denial of review of a decision of the State Bar Court constitutes a final judicial determination on the merits and the recommendation of the State Bar Court is filed as an order of the Supreme Court.

Among other ethical violations, Petitioner was found to have willfully collected an unconscionable fee in the amount of $266,850.00[2] in violation of the Medical Injury Compensation Reform Act ("MICRA")[3] which set

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[2] The determination that petitioner was wrongfully enriched by $266,850 was based on the State Bar Court's finding that he collected and did not charge an illegal fee. This distinction is important because the MICRA fee limits increased after petitioner agreed to represent his client. If petitioner was found to have charged his client a fee in violation of the MICRA fee caps, the fee in excess of the MICRA limits would have equaled $466,100.

[3] The Medical Injury Compensation Reform Act provides that:

> [a]n attorney shall not contract for or collect a contingency fee for representing any person seeking damages in connection with an action for injury or damage against a health care provider based upon such person's alleged professional negligence in excess of the following limits ..."

MICRA was the California Legislature's remedy to skyrocketing premiums for medical malpractice insurance policies which implicated the availability of adequate medical care. The maximum fee limits under MICRA were increased in 1988. Petitioner's Petition for Writ of Certiorari (hereinafter "Pet."), Review Department of the State Bar Court, Opinion on Review, App. B, p. B.11, n. 8.

attorney fee limits in medical malpractice contingency cases. As cogently summarized by the Review Department of the State Bar Court:

> This case is about more than an attorney simply collecting more fees than state law allowed. Rather it reveals how an unsophisticated client, in this case an incompetent adult whose mother obtained respondent's services, can be taken advantage of by an attorney who fails to reveal material information in favoring his own interest over the client's interests in receiving all the recovery she is entitled by law to receive.

Pet., Review Department of the State Bar Court, Opinion on Review, Appendix B, p. B2.

Despite a full and complete evidentiary hearing and findings based upon overwhelming evidence of culpability, Petitioner persists in pressing his cause before this Court relying on several unwarranted and baseless contentions.

Petitioner first argues that a writ of review should be granted on the basis that he was denied due process because the State Bar Court found, *inter alia*, that he was grossly negligent in violating the California Rules of Professional Conduct. He contends that this finding of gross negligence was tantamount to a finding that he acted incompetently. Incompetence was a charge that he was not notified of or charged with. Petitioner's argument is tortured and specious. Due process was satisfied because Petitioner was notified of all the charges on which culpability was found and he was provided an opportunity to defend himself.

Petitioner next argues that he was denied due process when discipline was imposed despite his assertion of a good faith belief that he was entitled to the attorney fees it was later determined were illegally collected. Again, Petitioner's contention is groundless because his so-called "honest belief" was contradicted by other evidence,

and even if uncontradicted, did not vitiate the existence of his wrongdoing.

Petitioner's assertion that his disciplinary suspension for misconduct constituted an unlawful taking of property under the Fifth Amendment is not supported by any legal authority. In addition, in accordance with attorney disciplinary proceedings in California, he was provided full due process protection.

Further, Petitioner contends that the MICRA statute is invalid and therefore its enforcement against him violates equal protection. This argument is frivolous on its face.

A. Procedural History

Petitioner was admitted to the State Bar of California on January 11, 1949. On October 12, 1990, a Notice to Show Cause was filed against Petitioner. The Notice to Show Cause alleged various violations of the State Bar Act and the Rules Of Professional Conduct associated with Petitioner's collection of an unconscionable

fee in a medical malpractice case. Petitioner filed his Answer to the Notice to Show Cause on October 26, 1990.

Over a period of ten days between November 2 and December 2, 1992, a hearing on culpability was conducted before the Hearing Department of the State Bar Court. On May 6, 1993, the Hearing Department filed its Notice of Facts Judicially Noticed & Tentative Rulings on Culpability. A hearing to determine the degree of discipline was held on June 16, 1993. On July 31, 1993, the Hearing Department filed its Decision concluding that Petitioner was culpable of misconduct and recommending a thirty (30) day actual suspension.

On August 12, 1993, Petitioner moved for a hearing *de novo* and to introduce additional evidence. On August 18, 1993, the State Bar requested reconsideration of the Hearing Department's Decision. A hearing was held on Petitioner's motion and the State Bar's request for reconsideration on September 9, 1993. Petitioner's motion

was denied as was the State Bar's request for reconsideration.

On or about October 5, 1993, Petitioner requested review of the Hearing Department's Decision contending that the Hearing Department's findings of culpability were in error. On November 3, 1993, the State Bar requested review on the basis that the discipline imposed was insufficient in light of the egregious nature of Petitioner's misconduct. On April 4, 1995, the Review Department filed its Opinion on Review concluding that the Hearing Department's recommendation of discipline was insufficient to address the serious nature of Petitioner's wrongdoing. Accordingly, the Review Department recommended a six month actual suspension.

On or about August 10, 1995, Petitioner petitioned the California Supreme Court for review of the State Bar Court's opinion. The California Supreme Court denied Petitioner's petition for review and adopted the Review Department's recommendation of discipline by order filed

April 25, 1996. On May 7, 1996, the California Supreme Court amended its April 25, 1996 order to reflect that Justice Mosk would have elected to grant the petition. On or about June 12, 1996, Petitioner requested the California Supreme Court to stay the order imposing discipline. By letter dated May 10, 1996, the California Supreme Court returned unfiled Petitioner's request for stay informing him that the order of the Court denying his petition for review was final forthwith and would not be reconsidered. Petitioner now seeks a writ of certiorari to review the California Supreme Court's Order imposing discipline.

Petitioner is currently serving the six months actual suspension.

B. Statement of Facts

The following is a summary of the facts:

On November 4, 1986, Wendy Paulis, 32-years old, underwent elective surgery and never awoke from the anesthesia. She fell into a permanent semi-comatose condition. In December 1986, Petitioner and Loretta

Paulis, Wendy Paulis' mother, met to discuss the possibility of filing a medical malpractice action against the hospital and the attending physicians. Petitioner, an experienced medical malpractice attorney, agreed to investigate the matter to determine whether to accept the case and stated that if there was no successful result, no fee would be requested. Petitioner also informed Mrs. Paulis that in the event of a successful result, the Court would determine what his fee would be. However, Petitioner, who was well-informed of the fee limitation provisions of the Medical Injury Compensation Reform Act ("MICRA") (Calif. Bus. & Prof. Code § 6146)[4], failed to advise Mrs. Paulis about

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[4] Petitioner is reputed to be prominent in the field of personal injury and medical negligence cases. Moreover, Petitioner testified before the California Legislature in 1975 during committee hearings on the MICRA provisions and has remained a steadfast opponent of MICRA. Petitioner or his law firm have participated as amicus curiae in several lawsuits unsuccessfully challenging the constitutionality of the MICRA statute. Also, Petitioner has been a defendant in two published cases brought by clients contesting his fees as implicated by the MICRA provisions. Schultz v.

(continued...)

the fee limitations of MICRA. At no time during Petitioner's representation of Mrs. Paulis did he inform her of the statutory fee caps.

On March 11, 1987, Petitioner filed a medical malpractice complaint against the hospital and its medical staff in the Superior Court of San Bernardino County. Soon thereafter, Mrs. Paulis was appointed her daughter's guardian ad litem and conservator of the person and estate of Wendy Paulis.

During settlement discussions, Petitioner informed his client that the local rules of the state Superior Court governing the payment of attorney fees in tort cases involving incompetents was 25 percent of the recovery if the case settled more than two weeks before trial, and one-third if the case settled within the two weeks or in

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[4](...continued)
Harney, 27 Cal.App.4th 1611, review den. Dec. 21, 1994; Fineberg v. Harney & Moore, 207 Cal.App.3d 1049, review den. April 26, 1989. Pet., Review Department of the State Bar Court, Opinion on Review, App. B, pp. B3-4.

trial.[5] Petitioner agreed to take the lessor fee. Again, Petitioner did not inform his client that the 25 percent recovery in this case would violate the MICRA fee caps.

A compromise of the action was reached following jury selection and several days of testimony with a settlement value of $3,450,000.00.

On July 19, 1988, Mrs. Paulis filed a Petition of Guardian Ad Litem & Conservator of Disputed Claim of Incompetent ("petition for compromise") which requested the court's approval to pay Petitioner $846,250.00 (or 25% of the recovery) in attorney fees and $65,000.00 in expenses. In a hearing before Judge Turner at which only Petitioner and Mrs. Paulis were present, Judge Turner approved the Petitioner for compromise.

---

[5] San Bernardino Supreme Court Rules, Rule 1111 sets forth a schedule for determining when charges for attorney's fees "ordinarily will be considered unreasonable in tort actions compromised under section 372 of the [California] Code of Civil Procedure or section 3302 of the [California] Probate Code."

Petitioner did not inform Judge Turner of the applicability of the MICRA fee limitations. Indeed, Judge Turner testified in the State Bar proceedings that the applicability of MICRA did not occur to him because the standard 25 percent award imposed by county guidelines for incompetent cases was normally lower than the maximum permitted by MICRA. Further, Judge Turner testified that if he had been aware of the discrepancy between the fees awarded pursuant to county probate policy and those allowed by MICRA, he would have held a hearing to determine whether he had jurisdiction to exceed the MICRA fee caps. Indeed, Petitioner collected a contingency fee which was $266,850 in excess of the legal limit.

Following settlement of the medical malpractice matter, Mrs. Paulis became aware that Petitioner collected a contingency fee in violation of the limits imposed by MICRA. Mrs. Paulis employed counsel to represent her

daughter Wendy Paulis and herself as guardian in a request for refund of the excess fees.

A written demand was made to Petitioner for return of the excess fees. Petitioner rejected the request asserting that the fee collected was not based upon a contingent fee arrangement and, therefore, not covered by MICRA. Counsel for Mrs. Paulis then filed a disciplinary complaint against Petitioner and also filed a civil suit seeking to collect the overcharged amount.

## REASONS FOR DENYING THE WRIT

### A. The California Supreme Court's Determination that Petitioner Should be Disciplined Does Not Raise Important Federal Questions

Review on a writ of certiorari is not a matter of right and will be granted only where there are special and important reasons. Rule 10, Rules of Supreme Court of the United States. None of the applicable reasons set forth in Rule 10 are available here. The California Supreme

Court decision at issue does not conflict with that of any other state court of last resort or of a federal appeals court (rule 10(b)); and the California Supreme Court decision at issue does not decide an important federal question of federal law that should be decided by this Court, nor is it in conflict with any decision of this Court (rule 10(c)). Moreover, Petitioner's claims are fact dependent and of no consequence for other litigants.

B. **Petitioner's Claim That He Has Been Disciplined For An Uncharged Ethical Offense Is Meritless**

The State Bar Court found that Petitioner's violation of the MICRA statute was clearly wilful. Pet., Review Department of the State Bar Court, Opinion on Review, Appendix B, p. B15. In addition, the State Bar Court concluded that Petitioner "wilfully" failed to disclose the MICRA fee limitations to his client and the court "through gross negligence." Pet., Review Department of the State Bar Court, Opinion on Review, Appendix B, p.

B23. There is no basis for Petitioner's contention that the Review Department's language that he wilfully violated the Rules of Professional Conduct through gross negligence transformed a well-established finding of material nondisclosure into a charge of incompetence, thereby, imposing discipline for an offense without proper notice. Petitioner's argument is absurd.

Petitioner is entitled to due process meaning that he must be afforded a "fair hearing overall". Dahlman v. State Bar 50 Cal.3d 1088, 1094 (1990); See Matter of Jacobs, 44 F.3d 84, 89-90 (2nd Cir. 1994). Within the umbrella of due process protection, Petitioner is entitled to fair notice of the charges against him which is essential if he is to properly defend himself. Rosenthal v. Justices of the Supreme Court of California, 910 F.2d 561, 564-565 (9th Cir. 1990) ["The State of California provides attorneys subject to discipline with more than constitutionally sufficient procedural due process"]. So long as Petitioner was notified of the charges that were actually filed against

him and had adequate opportunity to respond, due process has been satisfied. See id at 564; In Re Ruffalo, 390 U.S. 544, 551, 88 S. Ct. 1222, 1226 (1968). Petitioner can cite to no authority for the proposition that he must be notified of all possible and uncharged violations that the evidence might sustain.

Notably, Petitioner has not claimed that he was denied notification of the charges for which he ultimately was found culpable or that he was not provided an opportunity to defend himself against these charges. Indeed, Petitioner was properly notified of and eventually disciplined for numerous violations of ethical misconduct. Accordingly, Petitioner was not found culpable for an uncharged offense and was provided adequate due process.

C. **The Evidence Strongly Supports The Order Of Discipline Notwithstanding Petitioner's Groundless Assertions That He Demonstrated An Uncontradicted Good Faith Belief In His Actions**

Petitioner maintains that he advocated a good faith belief in his actions which was undisputed by other evidence. Therefore, he maintains, to find him culpable under these circumstances violates his right to due process. This claim is groundless.

Under state decisional law, whether or not Petitioner held an honest belief in his actions, is not a defense and does not eliminate the existence of the misconduct. See e.g. Read v. State Bar 53 Cal.3d 394, 411 (1991). Moreover, the record supported the Review Department's conclusion that based upon Petitioner's superior knowledge of MICRA issues, he misled the court and his client on a material issue for his own financial

gain. Pet., Review Department of the State Bar Court, Opinion on Review, Appendix B, p. B20.

Petitioner was afforded the right to present a defense and have witnesses testify on his behalf. See Rosenthal v. Justice of the Supreme Court of California, 910 F.2d at 564. Petitioner, however, does not have a concomitant constitutional right to be believed, particularly, in the face of contradictory evidence clearly supporting the findings of culpability.

**D. Petitioner's Claim That He Was Deprived Of "Property" Without Due Process In Violation Of the Fifth Amendment Is Belied By The Record**

As indicated above, in attorney disciplinary proceedings, due process requires that Petitioner be afforded a full and fair hearing. See Matter of Jacobs, 44 F.3d at 90. Petitioner was clearly provided a full evidentiary hearing with ample opportunity to present evidence. Petitioner can provide no authority for his

groundless assertion that suspension of his license to practice law, based on findings and conclusions that he violated his ethical obligations to his client, constitutes an improper taking of a property right.

**E. Petitioner's Claim That He Has Been Denied Equal Protection Of The Laws Based On A Subjective And Conclusory Assertion That The Statute He Violated No Longer Serves A Legitimate State Purpose Is Clearly Meritless**

To bolster his petition for review by the Court, Petitioner proffers a conclusory allegation that no legitimate purpose is now or was ever served by the MICRA statute. Clearly, Petitioner's personal opinion that the statute's purpose was unwise and has ceased to exist does not create an equal protection claim. See Railway Express Agency, Inc. v. New York, 336 U.S. 106, 110, 69 S.Ct. 463, 465 (1949) (theoretical inconsistencies in state statute do not present an equal protection question). The

validity of the legislation is presumed (Asbury Hosp. v. Cass County 326 U.S. 207, 215, 66 S.Ct. 61, 65 (1945)), and Petitioner has not shown that the statute bears no relation to the purpose for which it was enacted. See Railway Express Agency, Inc. v. New York, 336 U.S. at 110, 69 S.Ct. at 465.

Finally, the Equal Protection Clause requires only that all legislative classifications have a reasonable basis and that everyone placed within this classification be treated similarly. United States v. Fallon, 407 F. 2d 661 (C.A. Ill.), cert. den., 395 U.S. 908 (1969). Petitioner can make no claim that he has been treated differently from other attorneys similarly situated.

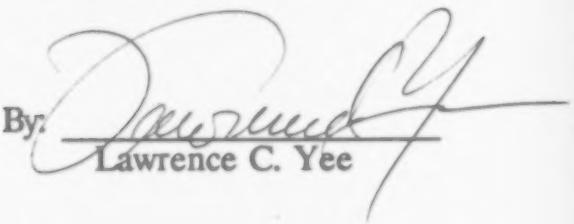
## CONCLUSION

It is respectfully submitted that Petitioner has failed to present any facts to support his request for a writ of certiorari, nor has he demonstrated that any of the actions taken by respondent in connection with his case were improper. For these and all of the foregoing reasons,

Respondent the State Bar of California respectfully requests this Court to deny the petition for writ of certiorari.

DATED: June 28, 1996 Respectfully submitted,

DIANE C. YU
LAWRENCE C. YEE
MARK TORRES-GIL

By: 
Lawrence C. Yee

*Attorneys for Respondent*